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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1911

## No. [redacted] 64

LOUISVILLE & NASHVILLE RAILROAD COMPANY, APPELLANT,

vs.

THE F. W. COOK BREWING COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED JUNE 7, 1912.

(21,713.)

(21,713.)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1910.**

## No. 238.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, APPELLANT,

*vs.*

THE F. W. COOK BREWING COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

**INDEX.**



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 27, 1910.

a In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1907.

No. 1505.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
THE F. W. COOK BREWING COMPANY, Appellee.

Mr. Curran A. De Bruler, Mr. Henry L. Stone, Counsel for Appellant.
Mr. George A. Cunningham, Counsel for Appellee.

Appeal from the Circuit Court of the United States for the District of Indiana.

1 *Placita.*

Pleas of the Circuit Court of the United States for the District of Indiana, begun and holden at the United States Court House in the city of Indianapolis in said District, on the first Tuesday in November, in the year of our Lord one thousand nine hundred and seven, before the Honorable Albert B. Anderson, Judge of the District Court of the United States for the District of Indiana, and ex-officio Judge of said Circuit Court.

2 *Transcript from Vanderburgh Circuit Court.*

Filed May 2, 1907.

No. 10690. Chancery.

THE F. W. COOK BREWING COMPANY
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Be it remembered that heretofore, to-wit, at the November 1906, Term of said Court, on the 2nd day of May, 1907, before the Honorable Albert B. Anderson, Judge of said Court, the following proceedings in the above entitled cause were had, to-wit:

Comes now the defendant by C. A. De Bruler, Esq., its solicitor, and files and enters in this court a certified transcript of the proceedings had and papers filed in the Vanderburgh Circuit Court in the above entitled cause, in the words following, to-wit:

STATE OF INDIANA,
*Vanderburgh County, ss:*

In the Vanderburgh Circuit Court, March Term, 1907.

THE F. W. COOK BREWING COMPANY
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Be it remembered that heretofore, to-wit, on the first day of April, 1907, the plaintiff, the F. W. Cook Brewing Company, filed in the

Vanderburgh Circuit Court its complaint against the defendant, the Louisville & Nashville Railroad Company, which reads as follows:

3 *Complaint.*

Filed April 1, 1907.

In the Vanderburgh Circuit Court, March Term, 1907.

THE F. W. COOK BREWING COMPANY
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

The plaintiff complains of the defendant and says: That the plaintiff is a corporation duly organized and existing under the laws of the State of Indiana and is engaged in the manufacture of beer in the city of Evansville, in said state, and the sale thereof in said city and state and other states and territories and foreign countries. That the plaintiff has and for many years has had a large trade in beer manufactured by it as aforesaid in the state of Kentucky, confined principally to cities and towns of that state. That defendant for many years has operated a system of railroads connecting the city of Evansville with many of the cities and towns of the state of Kentucky. That for many years the plaintiff has been accustomed to ship to its customers in the state of Kentucky and elsewhere over the lines of the defendant the beer manufactured by it as aforesaid. That the plaintiff has during said years built and established an extensive and valuable trade in beer in the state of Kentucky and has secured in the cities and towns thereof and elsewhere in said state many customers who depend on the plaintiff to furnish them with beer, and on whose continued trade the success of the plaintiff's business to a considerable extent depends. That until the occurrence of the grievance hereinafter mentioned the defendant has at all times accepted shipments of beer offered by the plaintiff for points on its lines in the state of Kentucky on the payment of the usual and customary freight charges, and has transported and delivered the same to the consignees without question or discrimination. That the shipments so made by the plaintiff as aforesaid have been in car load lots and in less than car load lots, and in the conduct of the plaintiff's business it has been and will continue to be necessary for it to make shipments to its customers as aforesaid both in car load lots and in less. That all of the shipments so made by the plaintiff as aforesaid, and also all of the shipments tendered and re-
4 fused as hereinafter set forth consisted of cases and packages in proper shape, form and condition for shipment and transportation and were substantially in the same condition and form as beer shipped generally by manufacturers throughout the United States and elsewhere.

That on or about the — day of March, 1907, the plaintiff received an order for a shipment of beer from a customer at Elkton, Ken-

tucky. That thereupon the plaintiff tendered to the defendant said beer in proper form for shipment accompanied by proper shipping directions and offered to pay thereon the usual and customary freight charges. That the defendant accepted said shipment and undertook to deliver the same to the consignee, but refused to do so subsequently returned the same to plaintiff.

That on or about the — day of March, 1907, the plaintiff received an order from one of its customers at Allenville, Kentucky, for a shipment of beer to be made to that point, and thereupon the plaintiff delivered said shipment to the defendant in proper form for shipment accompanied with proper directions as to shipping and offered and agreed to pay to the defendant the usual and customary freight charges therefor. That the defendant accepted said shipments and agreed to deliver the same to the consignees at Allenville, Kentucky, but thereafter refused to do so and returned the same to the plaintiff, and has ever since declined and refused and still refuses to transport and deliver said shipment, although the plaintiff has complied with all of the conditions on its part ordinarily required of shippers.

That on or about the 25th day of March, 1907, the plaintiff received an order from a customer at Mannington, Kentucky, for five (5) cases of beer, and thereupon tendered the same to the defendant in proper form for shipment with proper directions as to shipment and offered to pay to the defendant the usual and ordinary freight charges, but the defendant refused to receive and ship the same and has ever since refused and still refuses so to do.

That on or about the 25th day of March, 1907, the plaintiff received an order from a customer at Mannington, Kentucky, for five (5) cases of beer, and thereupon tendered the same to the defendant in proper form for shipment with proper directions as to shipment and requested the defendant to receive and ship the same to its said customer and offered to pay the usual and ordinary freight charges, but the defendant refused to receive and ship the same.

5 That on or about the 29th day of March, 1907, the defendant received an order from a customer at Elkton, Kentucky, for one car load of beer, and also an order for one car load of beer from a customer at Allenville, Kentucky, to be shipped to said respective points. That thereupon the plaintiff demanded of the defendant that it accept and ship said beer and offered to pay therefor the usual and customary freight charges and offered to deliver said beer aboard the defendant's cars and to comply with all of the conditions required by the defendant from shippers in relation to the shipment of beer in car loas lots. That the defendant wholly refused to receive said shipments and notified the plaintiff in writing that thereafter and until further advised it would refuse all shipments of beer to all points on its line of railway in the state of Kentucky known as local option points.

That plaintiff further states to the court that all of the said points in Kentucky to which the plaintiff has been refused shipments as aforesaid are situated upon its said lines of railway and are points

to which in the ordinary course of traffic it delivers beer and other merchandise both in car load lots and less. That no other railroad or public carrier available to the plaintiff reaches said points, and that the plaintiff's said lines of railway are the only means by which the plaintiff can deliver beer to its customers at said places.

The plaintiff further avers that all of said points are in counties or districts of the state of Kentucky known as local option districts in which under the laws of the state of Kentucky the sale of intoxicating liquors is prohibited. The plaintiff avers, however, that the said laws of the state of Kentucky do not apply to sales and shipments made by persons engaged in interstate commerce and do not apply to the shipments offered by the plaintiff and that under the laws of the state of Kentucky it is lawful for the plaintiff to ship its beer and deliver the same to its customers at the places aforesaid.

The plaintiff avers, however, that while said points are in so-called prohibition counties or districts where by vote of the people the sale of intoxicating liquors at the date said shipments were tendered was prohibited, still under the laws of the state of Kentucky it was at those dates and still is lawful for persons having unexpired liquor licenses to sell intoxicating liquors until their licenses expired. That at said dates the persons to whom the plaintiff had sold said beer and to whom the same was consigned had unexpired licenses for
6 the sale of intoxicating liquors in the respective counties in which said places were situate, and it was and is lawful for such persons to sell intoxicating liquors in said respective counties until the expiration of their respective licenses. That as more fully hereafter set forth the defendant has since the dates aforesaid refused and still refuses to make shipments of beer tendered by the plaintiff from Evansville, Indiana, to all so-called prohibition counties or districts in the state of Kentucky whether consigned to customers having unexpired licenses or not, and that it is the purpose and policy of the defendant, and it has so notified the plaintiff, to refuse to ship any beer offered by the plaintiff at Evansville, Indiana, to all prohibition counties or districts in the state of Kentucky without regard to the fact that in many of said counties, particularly at the points aforesaid, the plaintiff has customers who have unexpired licenses under which it is lawful for them to sell intoxicating liquors in said counties and districts.

That so far as plaintiff is advised there have been no prosecutions for shipments of beer or intoxicating liquors from points outside of the state of Kentucky to persons within said states residing in local option districts, except certain prosecutions in the Calloway Circuit Court against Southern Express Company which had delivered to a consignee in a local option district in Kentucky certain intoxicating liquors shipped by a consignor at Jackson, Tennessee, and in this instance it was held by the Calloway Circuit Court of Calloway County, in the state of Kentucky, that the said laws of the state of Kentucky prohibiting the sale of intoxicating liquors did not apply to shipments made from points outside of the state. That the Illinois Central Railroad Company, and so far as the plaintiff is advised other railroad companies and common carriers of the state

of Kentucky, receive beer and other intoxicating liquor at points outside of the state of Kentucky and deliver the same at any points within said state on their lines whether the same be local option districts or not. That so far as plaintiff is advised the defendant is the only common carrier engaged in the business of shipping merchandise into and out of the state of Kentucky that refuses to ship beer from points outside of the state to points therein whether the same be local option points or not. That the defendant has at sundry times in the past made shipments of beer from points in other states to local option points in Kentucky and has not
7 been subjected to prosecution on account thereof, and plaintiff avers that it verily believes that the shipments of plaintiff's beer requested as above will not subject the defendant to any liability under the laws of Kentucky or even to any prosecution on account thereof. That the defendant has since the — day of March, 1907, refused to receive from the plaintiff any shipments of beer consigned to local option points in said state and the plaintiff avers that it is the policy and purpose of the defendant, and it will unless restrained and inhibited by the court continue to refuse shipments of beer offered by the plaintiff as aforesaid. That by said refusal the plaintiff is and will continue to be unable to fill orders given it by its customers as aforesaid, will lose the business and trade established as aforesaid, and will suffer great and irreparable loss.

That in the usual and ordinary course of its business the plaintiff receives orders from its customers in Kentucky for beer in the course of every few days by reason whereof an emergency exists for the granting of a temporary restraining order without awaiting notice to the defendant of the application therefor. If the granting of a temporary restraining order is delayed until the final hearing of this cause and until notice can be regularly given to the defendant the plaintiff by reason of the delay occasioned thereby will suffer great and irreparable loss and injury.

Wherefore, the plaintiff prays that the defendant and its officers, agents, servants and employees be enjoined and inhibited from refusing to receive and ship to local option or other points in Kentucky on its said lines of railway shipments of beer tendered by the plaintiff and accompanied by the usual and customary freight charges; that they be enjoined from refusing to grant to the plaintiff the same facilities for shipment of beer to local option or to other points in Kentucky as are granted to other shippers; that the defendant and its said officers, agents, servants and employees be enjoined and inhibited from refusing to perform and discharge to the plaintiff the duties it owes it as a common carrier, and from continuing to refuse to the plaintiff the same facilities for shipment of its beer to points in Kentucky as are afforded to the shipping public generally, and from discriminating against the plaintiff in the shipment of its beer either on account of the character of the plaintiff's busi-
8 ness or otherwise and for all other proper relief in the premises.

GEO. A. CUNNINGHAM,
*Attorney for Plaintiff.*

STATE OF INDIANA,
*Vanderburgh County, ss:*

Adolph B. Schmidt, being first duly sworn on his oath *days* he is agent of the above named plaintiff, The F. W. Cook Brewing Company. That he has read the foregoing complaint and knows the contents thereof and that the same are true as he verily believes.

ADOLPH B. SCHMIDT.

Subscribed and sworn to before me this first day of April, 1907.

BESSIE LUCK,
*Notary Public.*

Commission expires November 14, 1909.

And afterwards, to-wit, on the day and year aforesaid, the clerk of said court issued the following summons in said action, to-wit:

*Summons.*

Issued April 1, 1907.

STATE OF INDIANA,
*Vanderburgh County, ss:*

The State of Indiana to the Sheriff of Vanderburgh County, Greeting:

You are hereby commanded to summon Louisville and Nashville Railroad Company, H. K. Corrington, Chief Clerk to appear in the Vanderburgh Circuit Court of Vanderburgh County, before the Judge thereof, on the 15th day of April, 1907, at the Court House in Evansville, to answer to complaint of The F. W. Cook Brewing Company. And of this writ make due return.

Witness, the clerk of said court and the seal thereof hereunto affixed at Evansville, this 1st day of April, 1907.

[SEAL.] GUILD C. FOSTER, *Clerk,*
By J. ESSLINGER, *Deputy.*

9 *Return to Summons.*

The return on said summons reads as follows, to-wit: *Ca* Came to hand April 1st, 1907. Served the within named defendant "Louisville and Nashville Railroad Company" by reading this summons to and within the hearing of H. K. Corrington, chief clerk for said company, he being the highest and only officer or agent of said defendant to be found in my bailiwick, and by delivering to him a true copy of the same.

WM. E. BARNES, *S. V. C.* [SEAL.]

April 1st, 1907.

Fees 95c.

And afterwards, to-wit, on the day and year aforesaid the plaintiff issued the following notice that it would apply for a tenfporary restraining order in said cause and said notice and the service thereon reads as follows, to-wit:

*Notice.*

Issued April 1, 1907.

In the Vanderburgh Circuit Court, March Term, 1907.

THE F. W. COOK BREWING COMPANY
v.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

The defendant is hereby notified that on the first day of April, 1907, at 2 o'clock P. M., or as soon thereafter as counsel can be heard the plaintiff will apply to said court for a temporary restraining order restraining the defendant from declining and refusing to accept shipments of beer offered by the plaintiff to the defendant for shipment to points in the state of Kentucky.

GEO. A. CUNNINGHAM,
*Attorney for Plaintiff.*

The above notice was this day served on the above named defendant, Louisville and Nashville Railroad Company, by reading and delivering a copy thereof to Lee Howell, General Freight Agent of said Company.

WM. E. BARNES, *S. V. C.*

April 1st, 1907.

Fees 95c.

10 And afterwards, to-wit, on the day and year last aforesaid, the following proceedings were had in said cause, to-wit:

*Restraining Order of April 1, 1907.*

In the Vanderburgh Circuit Court, March Term, 1907.

THE F. W. COOK BREWING COMPANY
v.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Comes now the plaintiff by George A. Cunningham, its attorney; comes also the defendant, Louisville and Nashville Railroad Company by De Bruler, Welman and De Bruler, its attorneys. And now the plaintiff tenders its undertaking with F. W. Cook as surety which is approved by the court. And now the plaintiff's application for a temporary restraining order is submitted to the court and the court having examined the plaintiff's verified complaint and being duly advised in the premises now grants the same.

It is therefore considered, adjudged and decreed by the court that until the further order of the court the defendant, its officers, agents, servants and employees be and they are hereby enjoined and inhibited from refusing to receive and ship to local option or other shipping points on the line of its railway in the state of Kentucky *geet* tendered by the plaintiff in proper condition for shipment and accompanied by the usual and customary freight charges whether in car load lots or otherwise; that they be and are enjoined from refusing to grant to the plaintiff the same facilities for the shipment of beer to local option points in the state of Kentucky that are furnished for the shipment of beer to other points in said state; that they be enjoined and inhibited from refusing to perform and discharge to the plaintiff the same duties it owes and performs to shippers generally and from discriminating against the plaintiff in the shipment of its beer either on account of the character of the plaintiff's business or otherwise, and that it be enjoined and inhibited from refusing to receive, ship and deliver all shipments of beer offered or tendered by the plaintiff for points on its railway in the state of Kentucky whether the same be in local option districts or not, provided such shipments shall be in proper form and condition for shipment and ac-
11 companied by a payment or tender of the usual and ordinary freight charges therefor.

The defendant objects to the issuing of the above restraining order and asks time until tomorrow morning to file its petition and bond for the transfer of this cause to the Circuit Court of the United States for the District of Indiana, and for presenting to the court the question whether the complaint states facts sufficient to entitle plaintiff to the above restraining order and files the affidavit of C. A. De Bruler in support of said request, but the court overrules and denies said motion and request to which ruling the defendant excepts.

Entry.

LOUIS O. RASCH, *Judge.*

The bond of the plaintiff referred to in the foregoing entry reads as follows, to-wit:

*Injunction Bond.*

In the Vanderburgh Circuit Court, March Term, 1907.

THE F. W. COOK BREWING COMPANY

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

We undertake that the plaintiff in the above entitled cause shall pay to the defendant all damages and costs which may accrue by reason of the issue of the injunction or restraining order in said cause.

THE F. W. COOK BREWING CO.
G. MICHAEL DAUSSMAN,
*Sec'y & Treas.*

F. W. COOK.

Ex- & Approved April 1st, 1907.
LOUIS O. RASCH, *Judge.*

12 And afterwards, to-wit. on the 3d day of April, 1907, the following proceedings were had in said cause, to-wit:

*Order of Removal of April 3, 1907.*

THE F. W. COOK BREWING COMPANY
v.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Come now the parties and the defendant now withdraws the affidavit of C. A. De Bruler filed at the hearing on the plaintiff's application for a restraining order herein.

And now the defendant files its petition and bond to obtain a removal of this cause into the circuit court of the United States for the district of Indiana, and said bond is now approved by the court.

It is therefore ordered by the court that this cause be removed into the circuit court of the United States for the district of Indiana, and that the defendant enter a copy of the record in said cause in said last named court on or before the first day of the next regular session thereof.

Enter.

LOUIS O. RASCH, *Judge.*

The petition for the removal of said cause referred to in the foregoing entry reads as follows, to-wit:

*Petition for Removal.*

STATE OF INDIANA,
*Vanderburgh County, ss:*

In the Vanderburgh Circuit Court, March Term, 1907.

THE F. W. COOK BREWING COMPANY
v.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Your petitioner, the Louisville & Nashville Railroad Company, respectfully shows to the court that it is the defendant in the above entitled action, and that this action is of a civil nature and that if the plaintiff shall obtain the relief demanded in its complaint
13 in said action the defendant will sustain damages in more than the sum of two thousand dollars ($2000.00) exclusive of interests and costs, and the amount in dispute in said action exceeds the sum of two thousand dollars ($2000.00) exclusive of interest and costs. That the plaintiff was at the time of the bringing of this suit and still is a corporation organized under the laws of the state of Indiana, and was at the time of the bringing of this suit and still is a citizen and resident of the state of Indiana and of no other state, and the defendant the Louisville & Nashville Railroad Company was

It is therefore considered, adjudged and decreed by the court that until the further order of the court the defendant, its officers, agents, servants and employees be and they are hereby enjoined and inhibited from refusing to receive and ship to local option or other shipping points on the line of its railway in the state of Kentucky *geet* tendered by the plaintiff in proper condition for shipment and accompanied by the usual and customary freight charges whether in car load lots or otherwise; that they be and are enjoined from refusing to grant to the plaintiff the same facilities for the shipment of beer to local option points in the state of Kentucky that are furnished for the shipment of beer to other points in said state; that they be enjoined and inhibited from refusing to perform and discharge to the plaintiff the same duties it owes and performs to shippers generally and from discriminating against the plaintiff in the shipment of its beer either on account of the character of the plaintiff's business or otherwise, and that it be enjoined and inhibited from refusing to receive, ship and deliver all shipments of beer offered or tendered by the plaintiff for points on its railway in the state of Kentucky whether the same be in local option districts or not, provided such shipments shall be in proper form and condition for shipment and ac-
11 companied by a payment or tender of the usual and ordinary freight charges therefor.

The defendant objects to the issuing of the above restraining order and asks time until tomorrow morning to file its petition and bond for the transfer of this cause to the Circuit Court of the United States for the District of Indiana, and for presenting to the court the question whether the complaint states facts sufficient to entitle plaintiff to the above restraining order and files the affidavit of C. A. De Bruler in support of said request, but the court overrules and denies said motion and request to which ruling the defendant excepts.

Entry.

LOUIS O. RASCH, *Judge.*

The bond of the plaintiff referred to in the foregoing entry reads as follows, to-wit:

*Injunction Bond.*

In the Vanderburgh Circuit Court, March Term, 1907.

THE F. W. COOK BREWING COMPANY
v.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

We undertake that the plaintiff in the above entitled cause shall pay to the defendant all damages and costs which may accrue by reason of the issue of the injunction or restraining order in said cause.

THE F. W. COOK BREWING CO.
G. MICHAEL DAUSSMAN,
*Sec'y & Treas.*

F. W. COOK.

Ex- & Approved April 1st, 1907.
LOUIS O. RASCH, *Judge.*

12 And afterwards, to-wit. on the 3d day of April, 1907, the following proceedings were had in said cause, to-wit:

*Order of Removal of April 3, 1907.*

THE F. W. COOK BREWING COMPANY
v.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Come now the parties and the defendant now withdraws the affidavit of C. A. De Bruler filed at the hearing on the plaintiff's application for a restraining order herein.

And now the defendant files its petition and bond to obtain a removal of this cause into the circuit court of the United States for the district of Indiana, and said bond is now approved by the court.

It is therefore ordered by the court that this cause be removed into the circuit court of the United States for the district of Indiana, and that the defendant enter a copy of the record in said cause in said last named court on or before the first day of the next regular session thereof.

Enter.

LOUIS O. RASCH, *Judge.*

The petition for the removal of said cause referred to in the foregoing entry reads as follows, to-wit:

*Petition for Removal.*

STATE OF INDIANA,
*Vanderburgh County, ss:*

In the Vanderburgh Circuit Court, March Term, 1907.

THE F. W. COOK BREWING COMPANY
v.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Your petitioner, the Louisville & Nashville Railroad Company, respectfully shows to the court that it is the defendant in the above entitled action, and that this action is of a civil nature and that if the plaintiff shall obtain the relief demanded in its complaint
13 in said action the defendant will sustain damages in more than the sum of two thousand dollars ($2000.00) exclusive of interests and costs, and the amount in dispute in said action exceeds the sum of two thousand dollars ($2000.00) exclusive of interest and costs. That the plaintiff was at the time of the bringing of this suit and still is a corporation organized under the laws of the state of Indiana, and was at the time of the bringing of this suit and still is a citizen and resident of the state of Indiana and of no other state, and the defendant the Louisville & Nashville Railroad Company was

at the time of the bringing of this suit and still is a corporation organized under the laws of the state of Kentucky and is a citizen and resident of the state of Kentucky and of no other state.

Your petitioner further shows to the court that it is a railway corporation and is engaged in trade and commerce between the several states of the United States and was so engaged prior to and at the time of the bringing of the above entitled action and at the time of the alleged grievances and occurrences described in plaintiff's complaint. That the rights of said defendant company to conduct and manage its interstate business as such common carrier, which will be prevented if the prayer of the plaintiff in its complaint is sustained, is worth more than the sum of two thousand dollars ($2000.00) to your petitioner exclusive of interest and costs in this action. Your petitioner also shows to the court that by the laws of the state of Kentucky it is made a penal offense for your petitioner to accept and deliver intoxicating liquor of any character at the points described in the complaint of the plaintiff in said state of Kentucky, and that your petitioner will be indicted many times in said state of Kentucky if it should accept and deliver intoxicating liquor at said points in the state of Kentucky, which are all points in which it is unlawful under the law of the state of Kentucky to deliver intoxicating liquor of any character or to transport intoxicating liquors to such points and that your petitioner will be indicted many times in said state of Kentucky if it should accept and deliver said intoxicating liquor at any of said points, and be subject to fines amounting in the aggregate to large amounts, and the costs and expenses incident to defending such indictments will amount to more than two thousand dollars ($2000.00) exclusive of interest and costs.

Your petitioner further shows to the court that as shown by the averments of the complaint herein this suit arises under the
14 constitution and laws of the United States and especially under an act to regulate commerce passed by the Congress of the United States on the 4th day of February, 1887, and amended by an act of said Congress passed on the 29th day of June, 1906.

Your petitioner herewith presents a good and sufficient bond to obtain the removal of said cause into the circuit court of the United States for the district of Indiana conditioned that said petitioner will file in said court a copy of this record in this action on or before the first day of the next session of said circuit court of the United States and for the payment of all costs which may be awarded by said circuit court of the United States if said court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays that this court proceed no further herein except to make order for the removal of said cause as required by law and accept and approve the petitioner's bond aforesaid.

C. A. DE BRULER,
*Attorney for Defendant.*

STATE OF INDIANA,
*Vanderburgh County, ss:*

Lee Howell, being first duly sworn, upon his oath, says he is a General Freight Agent of the defendant, the Louisville & Nashville Railroad Company, and makes this affidavit on its behalf and that the facts stated in the foregoing petition are true.

LEE HOWELL.

Subscribed and sworn to before me this the 2nd day of April, 1907. My commission expires March —" 1908.

C. A. DE BRULER,
*Notary Public.*

The bond so filed by the defendant referred to in the foregoing entry reads as follows, to-wit:

*Bond.*

Know All Men by These Presents: That we, the Louisville & Nashville Railroad Company, as principal, and Lee Howell, as surety, are held and bound to the F. W. Cook Brewing Company in the penal sum of two hundred and fifty dollars ($250.00) upon the following conditions, to-wit:

Whereas, in an action pending in the Vanderburgh Circuit Court of the State of Indiana, in which the said F. W. Cook Brewing Company is plaintiff and the said Louisville & Nashville Railroad Company is defendant, said Louisville & Nashville Railroad Company has filed its petition for the removal of said cause for trial into the Circuit Court of the United States for the District of Indiana.

Now, therefore if the said Louisville and Nashville Railroad Company shall file the record of said cause in said circuit court of the United States for the District of Indiana on or before the first day of the next regular session thereof and shall pay all costs that may be awarded by said Circuit Court of the United States in said action if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and effect.

Witness our hands this the 2nd day of April, 1907.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By C. A. DE BRULER,
*Attorney in Fact.*
LEE HOWELL.

Ex. & Approved April 3rd, 1907.

LOUIS O. RASH, *Judge.*

*Certificate of Clerk.*

STATE OF INDIANA,
*Vanderburg County, ss:*

I, Guild C. Foster, Clerk of the Vanderburgh Circuit Court of the State of Indiana, certify that the foregoing transcript contains full, true and complete copies of all papers filed and entries made in said cause in said Vanderburgh Circuit Court.

Witness my hand and the seal of said Court this 9th day of April, 1907.

[SEAL.] GUILD C. FOSTER,
*Clerk V. C. C.*

And at the same time comes the defendant by counsel and files its answer herein in the words following, to-wit:

16 *Answer to Bill of Complaint.*

In the Circuit Court of the United States for the District of Indiana.

THE F. W. COOK BREWING COMPANY
v.
THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

The Answer of the Louisville & Nashville Railroad Company to the Bill of Complaint of the F. W. Cook Brewing Company.

This defendant now and at all times hereafter saving to itself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering says:

This defendant admits that it is a common carrier for hire as charged in the bill of complaint and is engaged in the business of transporting goods and merchandise between the several states of the United States, and between the states of Indiana and Kentuckye and was so engaged at the time of the grievances alleged in said bill of complaint. The defendant also admits the allegations of said bill of complaint that the plaintiff tendered to this defendant beer which is an intoxicating liquor to be transported to the point or points in the state of Kentucky which are set forth in the bill of complaint, and that the defendant refused and still refuses to accept or transport said intoxicating liquor to the different points in the state of Kentucky which are set forth in the bill of complaint.

This defendant avers that prior to the tender of said intoxicating liquor by the plaintiff to the defendant and before any of the occurrences or grievances described in said bill of complaint had occurred,

the legislature of the state of Kentucky, by an act approved March 21, 1906, entitled "An act to regulate the carrying, moving, delivering, transferring or distribution of intoxicating liquor in local option districts", made it unlawful for any person or persons, individual or corporation, public or private carrier to bring into or transfer to other person or persons, corporation, carrier or
17 agent, or to deliver or distribute in any county, district, precinct, town or city where the sale of intoxicating liquors has been prohibited, or may be prohibited, whether by special act of the General Assembly, or by vote of the people under the local option law any spirituous or vinous, malt or other intoxicating liquors regardless of the name by which it may be called, and provided that said act shall apply to all packages of such intoxicating liquors whether broken or unbroken and provided that any person, individual or corporation, public or private carrier violating the provisions of said act shall be deemed guilty of violating the local option law, and fined not less than $50 or more than $100 for each offense, and that the place of delivery of such liquors shall be held to be the place of sale, and that each package of such intoxicating liquor so brought into or transferred to any person in such local option territory shall constitute a separate offense. A copy of said act of the Kentucky legislature is filed with this answer as exhibit "A".

This defendant avers that each and all of the points or places in the state of Kentucky mentioned in said bill of complaint are points and places where under the laws of the state of Kentucky and by the vote of the people of such towns or places the sale of intoxicating liquor of any character is absolutely unlawful and that the defendant, if it should receive from the plaintiff any intoxicating liquor of any character and transport the same to such points and places in the state of Kentucky would render itself liable to prosecution by indictment in said state of Kentucky for violation of the act aforesaid.

This defendant further avers that the act of the Kentucky legislature above described was in full force and effect long prior to the time when the complainant tendered to the defendant such intoxicating liquor to be transported by the defendant into the prohibition districts and places described in the bill of complaint. That upon the passage and taking effect of said act of the Kentucky legislature and long prior to the tender by the plaintiff to the defendant of intoxicating liquor aforesaid to be transported to the points in the state of Kentucky aforesaid, this defendant in the exercise of its power as a common carrier to make reasonable rules and regulations as to the kind and character of goods and commodities which it would transport and carry as such common carrier gave notice to the public, including the complainant, that it would not
18 receive or carry any intoxicating liquor of any character to any of the points or places described in the bill of complaint herein. Such public notice was given so far as the complainant was concerned by filing with Wm. M. Lutz, the local freight agent of this defendant at the City of Evansville, Indiana, a circular open to the inspection of the public that it would not

accept or transport intoxicating liquor of any character to the large number of points and places in the state of Kentucky which are enumerated in said circular and in which are included the names of the points and place- described in the plaintiff's bill of complaint herein. Such notice was first given to the public by the defendant company by circular No. N. S. 2221, dated June 13, 1906, signed by D. M. Goodwyn, General Freight Agent of the defendant company, which circular was sent to each freight agent of the defendant company at all stations on its lines including Evansville, Indiana, and which circular was kept by said agents for the inspection of the public, and was also sent by the defendant company to each one of the connecting lines of this company, and was filed with the Interstate Commerce Commission. From time to time after said last mentioned date circulars similar in all respects to the first one so issued were issued by the defendant company and placed in the hands of all the freight agents aforesaid, and were filed with the Interstate Commerce Commission, and said succeeding circulars only differed from the first one issued in including more points and places in the state of Kentucky in which sales of intoxicating liquor were prohibited from time to time under the local option law of said state of Kentucky. A copy of the circular which was in force before the bringing of this action and before the tender by the plaintiff to the defendant company of the intoxicating liquor described in the bill of complaint, is filed herewith as Exhibit "B." The plaintiff was also personally notified by the proper officers of the defendant company at Evansville, Indiana, that no beer or other intoxicating liquor would be shipped by the defendant company from Evansville, Indiana, to any of the points or places described in plaintiff's bill of complaint, and such notice was given before the tender by the plaintiff of the beer described in the bill of complaint.

The defendant company further answering says that it is a corporation chartered by the laws of the state of Kentucky, and that it has done and before the bringing of this suit was doing
19 and is still doing business under and by authority of said charter and the amendments thereto and the laws of the state of Kentucky applicable thereto and under no other authority. The original charter of the defendant company was granteed by a special act of the Kentucky legislature, approved March 5, 1850, and which has been at various times amended by the legislature in said state of Kentucky. The present constitution of the state of Kentucky went — effect September 28, 1891, and said constitution prohibits the granting of special charters to corporations, and provides that the legislature shall pass a general corporation act. Section 190 of said constitution provides that no corporations in existence at the time of the adoption of such constitution shall have the benefit of future legislation without first filing in the office of the secretary of state an acceptance of its provisions. At the first session of the Kentucky legislature after this constitution went into effect a general corporation act was passed, which act, together with its amendments now constitutes section- 538 to 883*a* inclusive of the Kentucky statutes of 1903.

Section 570 of said Kentucky statutes provides that no law shall be passed for the benefit of or in the interest of any corporation heretofore created or organized by or under the laws of this state, or any other state, and that no corporation shall avail itself of the provisions of said act unless such corporation shall have previously, by a resolution adopted by its board of directors and filed in the office of the secretary of state, accept the provisions of said constitution. Thereafter, on July 11, 1902, the defendant by the proper resolution of its board of directors, a certain copy of which was filed in the office of the secretary of state of the state of Kentucky, accepted the provisions of the constitution of the state of Kentucky, and also the provisions of the act of the Kentucky legislature above referred to. By reason of said acts the defendant company is a Kentucky corporation deriving all its powers and authority from the laws of the state of Kentucky, and has no right to carry on any business except what it is authorized to do by the laws of the state of Kentucky, and the statutes of the state of Kentucky hereinbefore referred to, and a copy of which is filed as an exhibit to this answer, prohibiting the transportation of intoxicating liquor as aforesaid forms a part of the charter of the defendant company and is valid in its prohibition of the carrying into the state of Kentucky any intoxicating liquor and delivering the same at points where the sale thereof is unlawful so far as this defendant company is concerned.

The defendant further avers that as to the allegation in the bill of complaint that the shipments of intoxicating liquors tendered by the complainant to the defendant were consigned to persons having unexpired licenses to sell intoxicating liquors in the prohibition districts or counties enumerated in the bill of complaint, the defendant denies said allegation of the bill. And the defendant says that if the shipments so tendered were consigned to any such persons having at the time such unexpired licenses said licenses have long since expired and there are no persons in said prohibition districts or counties engaged in the sale of intoxicating liquors under licenses which have not yet expired.

The defendant further avers that the restraining order which was issued by the Vanderburgh Circuit Court of the state of Indiana, and which is still in force, in this case commands the defendant to receive and ship intoxicating liquors by the plaintiff to any and all points in the state of Kentucky and to any and all of the points in the prohibition districts and counties in the state of Kentucky set forth in the bill of complaint without regard to the question whether intoxicating liquor so tendered by the complainant for shipment was consigned to persons engaged in the sale of intoxicating liquor under licenses which had not expired at the time such shipment was tendered.

Wherefore, this defendant having fully answered, confessed, traversed, avoided or denied all the matters in the said bill of complaint material to be answered according to its best knowledge and belief, humbly prays this honorable court to enter its judgment that this defendant be hence dismissed with its reasonable costs and

charges in this behalf most wrongfully sustained, and that the injunction heretofore entered and issued against this defendant by the Vanderburgh Circuit Court of the state of Indiana prohibiting this defendant from refusing to accept and transport the intoxicating liquor aforesaid be dissolved, and for such further and other relief in the premises as to this Honorable Court may seem meet and in accordance with equity.

T. B. HARRISON, JR.,
C. A. DE BRULER,
*Solicitors for Defendant.*

21 *Affidavit of John W. Logsdon.*

STATE OF INDIANA,
*Vanderburgh County, ss:*

John W. Logsdon, being first duly sworn, says that he is the Superintendent of the Henderson and St. Louis Division of the Louisville and Nashville Railroad Company, and the chief officer of said company in the state of Indiana, and that the facts stated in the foregoing answer are true.

JOHN W. LOGSDEN.

Subscribed and sworn to before me this the 16th day of April, 1907. My commission expires March 17, 1908.

[SEAL.] G. R. DE BRULER,
*Notary Public.*

EXHIBIT "A."

An act to regulate the carrying, moving, delivering, transferring or distribution of intoxicating liquors in local option districts.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. It shall be unlawful for any person or persons, individual or corporation, public or private carrier to bring into, transfer to other person or persons, corporations carrier or agent, deliver or distribute, in any county, district, precinct, town or city where the sale of intoxicating liquors has been prohibited, whether by special act of the General Assembly, or by vote of the people under the local option law, any spirituous, vinous, malt or other intoxicating liquor, regardless of the name by which it may be called; and this act shall apply to all packages of such intoxicating liquors whether broken or unbroken.

Provided individuals may bring into such district, upon their person or as their personal baggage, and for their private use, such liquors in quantity not to exceed one gallon; And provided, The provisions of this act shall not apply to licensed physicians or drug-

gists, to whom any public carrier may deliver such goods, in unbroken packages, in quantity not to exceed five gallons at any one time.

SECTION 2. Each package of such spirituous, vinous, malt or other intoxicating liquor, regardless of the name by which it may
22 & 23 be called, whether broken or unbroken packages, brought into or transferred to other person, corporation, carrier or agent, delivered or dist-ibuted in such local option territory, shall constitute a separate offense.

SECTION 3. Any person or persons, individual or corporation, public or private carrier violating the provisions of this act shall be deemed guilty of violating the local option law and shall be fined not less than fifty nor more than one hundred dollars for each offense.

SECTION 4. And the place of delivery of such liquors shall be held to be the place of sale: Provided further, That the provisions of this act shall only apply to common carriers, corporations, firms or individuals who usually carry freight or goods for hire and every firm, common carrier, corporation or individual who receives pay for conveying vinous, malt or spirituous liquors shall be deemed a violator of the provisions hereof.

SECTION 5. And all laws in conflict with this act are hereby repealed.

Approved March 21, 1906.

I. C. C. No. A-9044.
(Cancels I. C. C. No. A-9028.)

# Louisville & Nashville R. R. Co.

OFFICE OF THE GENERAL FREIGHT AGENT.

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CIRCULAR No. N. S. 2426.
(Cancels Circular No. N. S. 2416, of March 5, 1907.)

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## HANDLING INTOXICATING LIQUORS FOR LOCAL OPTION DISTRICTS IN KENTUCKY.

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LOUISVILLE, KY., March 14, 1907.

TO AGENTS:

The following law was enacted at the last session of the Legislature of the State of Kentucky:

*Be it Enacted by the General Assembly of the Commonwealth of Kentucky:*

SECTION 1. It shall be unlawful for any person or persons, individual or corporation, public or private carrier to bring into, transfer to other person or persons, corporation, carrier or agent, deliver or distribute, in any county, district, precinct, town or city, where the sale of intoxicating liquors has been prohibited, or may be prohibited, whether by special act of the General Assembly or by vote of the people under the Local Option Law, any spirituous, vinous, malt or other intoxicating liquor, regardless of the name by which it may be called; and this act shall apply to all packages of such intoxicating liquors, whether broken or unbroken.

*Provided*, individuals may bring into such district, upon their person or as their personal baggage, and for their private use, such liquors in quantity not to exceed one gallon; and provided the provisions of this act shall not apply to licensed physicians or druggists to whom any public carrier may deliver such goods, in unbroken packages, in quantity not to exceed five gallons at any one time.

SECTION 2. Each package of such spirituous, vinous, malt or any other intoxicating liquor, regardless of the name by which it may be called, whether broken or unbroken packages, brought into and transferred to other person, corporation, carrier or agent, delivered or distributed in such Local Option Territory shall constitute a separate offense.

SECTION 3. Any person or persons, individual or corporation, public or private carrier violating the provisions of this act shall be deemed guilty of violating the Local Option Law, and shall be fined not less than fifty nor more than one hundred dollars for each offense.

SECTION 4. And the place of delivery of such liquors shall be held to be the place of sale. "Provided further, That the provisions of this act shall only apply to common carriers, corporations, firms or individuals who usually carry freight or goods for hire, and every firm, common carrier, corporation or individual who receives pay for carrying vinous, malt or spirituous liquors shall be deemed a violator of the provisions hereof."

SECTION 5. And all laws in conflict with this act are hereby repealed.

3000-3-11-1907. JOHN P. MORTON & COMPANY, LOUISVILLE, KY.

In event Agents at receiving points, through error, receive a shipment for a Local Option point, when it reaches that point the agent at said point of delivery, knowing that Local Option laws are in effect at the point, should decline to make delivery and notify the forwarding agent that shipment is undelivered on account of Local Option laws, and ask for instructions as to disposition.

The above applies to inter-state as well as intra-state shipments.

Following is a list of points in Kentucky at which Local Option laws exist, and to which shipments of intoxicating liquors should not be billed. Forwarding agents should refuse to accept such shipments, when offered, destined to any of these points:

Adairville
Addison
Adele
Aden
Allensville
Alcedo
Aliceton
Almo
Altamont
Alton
Alum Springs
Alson
Anita Springs
Argillite
Argyle
Arkle
Arlington
Artemus
Artemus Coal Co.
Ashers
Askins
Asphalt Junction
Athol
Auburn
Austerlitz
Bagdad
Baileys
Barbourville
Bardstown Junction
Bracht
Bracktown
Bradford
Brannon
Brassfield
Brighton
Brickdale
Brodhead
Brooks
Browder
Brumfield
Brummet
Bruce
Brush Creek
Bryant
Buchanan
Buckners
Burgaw
Burnside
Burk Hollow
Bushby Crossing
Butler
C.R.& T.R'd Jct.
Cadet
Cabaniss
Caldwell
California
Calvert
Camden
Corbin
Corinth
Corydon
Cottrell
Cove
Cowan
Cozatt
Crab Orchard
Craley Coal Co.
Craneyville
Crider
Crittenden
Croakes
Croppers
Crow Hickman
Crudup
Cumberland Falls
Cummins
Danville
Davis Quarry
Deanfield
Deatsville
DeKoven
Delmar
DeMossville
Dennis
Denton
Depoy
Dexter
Faber
Falls of Rough
Falmouth
Fariston
Farmers
Ferndale
Ferguson
Field
Filson
Finchville
Fisherville
Flanagan
Flat Lick
Flat Rock
Flat Top Mine
Flemingsburg
Flournoy
Fonda
Ford
Fordsville
Fort Estill
Fort Estill Junction
Foster
Four Mile
Fox Ridge
Franklin
Frozen
Fulton
Gaithers
Hansborough
Hansborough(HardinCo.)
Harbison
Hardin
Hardinsburg
Harlow
Harned
Harris Flat
Harvey
Hatton
Hawesville
Hayden House
Hayes
Hazel
Hazel Patch
Hedges
Heidelburg
Hendricks
Herndon
Hickman
Hickory
Highbridge
Hillsboro
Hill Spring
Himyar
Hinton
Hobbs
Hodgenville
Holt

Bardwell
Barlow
Barnes
Barnsley
Baskett
Bauer Cooperage Co.
Baughmans Mill
Bayless
Beard
Beattyville
Beattyville Junction
Beaver Dam
Bedford
Beech Creek Jct.
Belmont
Belton
Benton
Berea
Berkeley
Berry
Berwick
Bevier
Big Clifty
Birdeye Mine
Blackford
Blades
Blanche
Blanchet
Bloomfield Junction
Blowers
Bluff Boom
Blyth
Boaz
Bonham
Bonnieville
Booker
Boone
Booths
Bosworth
Bowden

Campbellsburg
Campbellsville
Campton(M.C.R'y)
Campton Junction
Campbellsville Rolling Mil
Caneyville
Cannel City
Carlisle
Carlsbad
Cary
Catawba
Cave City
Cave Springs
Cayce
Cecilia
Cedar Creek
Chadman
Champton Junction
Chapeze
Charter
Chenoa
Chilesburg
Christiansburg
City Quarry
Clay City
Clear Fork
Cleaton
Clermont
Clinton
Cloverport
Coalmont
Cobb
Colesburg
College Spur
Columbus
Concord
Conner
Contrary
Conway
Coolidge

Diamond Springs
Dividing Ridge
Dixon
Donora
Dover
Drakesboro
Dry Ridge
Duckers
Dudley
Dulaney
Duncannon
Dundee
Dunmor
Durell
Eagle
Earlington
East Bernstadt
East Jellico
East View
Edgotton
Edwards
Elizabethtown
Elkatawa
Elkchester
Elkin
Elite
Elliston
Elliott
Elva
Emanuel
Eminence
Emlyn
English
Enterprise
Epleys
Escondida
Eubanks
Evelyn
Ewing
Excelsior

Gallup
Gap
Gap-in-Knob
Garfield
Garrett
Garrison
Gathright
Geddes
Ghent
Gilbert
Gilbertsville
Gillum
Glasgow
Glasgow Junction
Glenarm
Glencairn
Glencoe
Glendale
Gordonton
Graham (Muhlenberg Co.)
Grand Rivers
Gravity Yard
Grays
Grayson
Grayson Springs
Greendale
Greenleaf
Greensburg
Greenville
Grove Center
Gum Sulphur
Guthrie
Haden
Hadensville
Halsey
Halstead
Hamilton
Hampton
Hanover
Hanson

Holt Mines
Horse Branch
Horse Cave
Hopewell
Howell
Hubers
Huffton
Hummel
Hunters
Hunterton
Hutchcraft
Hutchison
Hyattsville
Ilsey
Indian Fields
Irvine
Irvington
Island
Jackson
Jarbaly
Jeffersontown
Jellico Mining Co.
Jericho
Johnson
Jones
Joyes
Junction City
Karnes
Keels
Keene
Kenney
Kensee
Kenton
Ky. Lumber Co.
K. N. Junction
Keswick
Kevil
Kings
Kings Mountain
Kinkaid

Kirk
Kiserton
Knob Lick
Kosmosdale
La Center
Lagos
La Grange
Laketon
Lancaster
Langford
Larne
Lavinia
Lebanon Junction
Lee City
Leitchfield
Leon
Leota Coal & Coke Co.
Levingood
Levy
Lewisburg
Lewisport
L. & E. Junction
Lily
Lisman
Livia
Livermore
Livingston
Locust Lodge
Lodiburg
Lodona
Logana
Logan
Logsdon
Lombard
London
London Mfg. Co.
Lorena
Lot
Lotus
Louisa

Millwood
Mitchellsburg
Moberly
Monrovia
Moores
Mooreton
Moran
Morehead
Moreland
Morgan
Morning View
Morton
Moscow
Mountain Ash
Mt. Morgan Coal Co.
Mt. Vernon
Mullins
Muir
Muldraugh
Mumfordsville
Murray (Calloway Co.)
Myall
Myers
Myrlin
Narrows
Natural Bridge
Nealton
Nebo
Nepton
New Forest
Newland
New Laurel Coal Co.
New Union Coal Co.
New Vanderpool Mine
Nicholasville
Nolin
Normandy
North Jellico
Nuckols
Nussbaum
Oakdale

Pisgah
Pickett
Pikeville
Pinckard
Pine Grove
Pine Hill
Pine Hill Coal Co.
Pineville
Pineville Coal Co.
Pine Ridge (M.C.R'y)
Pittsburg
Pleasant View
Pleasure Ridge Park
Pleasant Valley
Pleasureville
Pocono
Point Leavell
Poplar Plains
Porter
Preston
Prestonburg
Providence
Pruitts Quarry
Pryors
Queensbury
Quincy
Rankin
Red House
Red Oak
Red River
Rendalia
Renick
Reynolds
Richwood
Riverside
Riverton
Riney
Robards
Rockport
Rock Haven
Rockhold

Siler
Silver Creek
Silver Springs
Silverville
Simpsonville
Sinks
Slate Lick
Slaughters
Slifer
Smithfield
Smith's Grove
Sniders
Soldier
Sonia
Sonora
South Boston
South Carrollton
South Siding
South Union
Sparks Quarry
Spears
Spotswood
Spottsville
Springfield
Spring Lick
Spring Station
Spokane
Spurlington
Standard Water Works
Stanford
Stanton
Star Coal Co.
St. Charles
Stearns
Stephensburg
Stephensport
Stepstone
Sterling
St. John
Stithton

Valley Hill
Valley View
Vancleve
Vanjeil
Veech
Veechdale
Vega
Verona
Versailles
Victoria Coal Co.
Vileys
Vine Grove
Virden
Wabunk
Waddy
Wagers
Wakefield
Wallsend
Walsh's Distillery
Walton
Wasioto
Water Valley
Watts Creek
Watts Creek Coal Co.
Waverly
Waynesburg
Webbville
Webster
Weldon
Wellsburg
Wendor
Wenrick
West Irvine
West Point
Wheatcroft
White Ash
White House
White Plains
Whites
Whitewood
Whitlock

| | | | | |
|---|---|---|---|---|
| L. & A. Junction | Oakton | Rocky Hill | Stony Fork Junction | Whitesville |
| Lowell | Oaton | Roger's Gap | Stroud | Wildie |
| Lucerne | Oberlies | Rookwood | Sturgis | Wilhurst |
| Lynnland College | O. & K. Junction | Rosine | Sullivan | Willard |
| Lyons | Oil City | Rossland | Sulphur | Williamsburg |
| Lynn | Olcott | Rosslyn | Summit (Hardin Co.) | Williamstown |
| Maceo | Old Landing | Rothwell | Sunbeam | Willow Shoals |
| Maloney | Olive Hill | Roundstone | Sunol | Willow Grove |
| Mammoth Cave | Olmstead | Royal | Sutherland | Wilmore |
| Mannington | Olympia | Royer Wheel Co. | Sylvania | Wilton |
| Marble Creek | Ophelia | Rowland | Tadcaster | Winlock |
| Maretburg | Orndorf | Rowletts | Taggart | Winona |
| Mason | Owenton | Russell | Talbot | Wister |
| Mayde | Owingsville | Salmons | Talmage | Withers Mill |
| Mayfield | Paint Lick | Salt Lick | Tarascon | Wilton Junction |
| Maywood | Paintsville | Salt River | Tarr | Wingo |
| Maxon | Panola | Salvisa | Tateville | Wofford |
| McHenry | Paris Junction | Samuels | Taylorsville | Woodbine |
| McKinney | Parks Hill | Sanders | Thomson | Woodland |
| McQuady | Parksville | Saxton | Tiptop | Woodlawn |
| Meadow Brook | Peach Orchard | Science Hill | Trabue | Wolf Lick |
| Melcon | Pendleton | Scotts | Trapp | Worthville |
| Mentor | Penrod | Scottsville | Trapps | Wright |
| Menzies | Perry | Searcy | Trenton | Wrights |
| Meridian | Perth | Sebree | Tunnel Hill | Wurtland |
| Mexico | Peru | Shanklin | Turners | Yarnallton |
| Midway | Pettit | Shawhan | Twin Tunnels | Yingling |
| Miller | Petroleum | Shearer | Uma | Yoder |
| Millersburg | Pewee Valley | Shelby City | Union | Zeda |
| Miller's Creek | Peytontown | Shepherdsville | Upton | Zion |
| Million | Pine Knot | Sherman | Utica | |

Under Section 2558, Kentucky Statutes—which is a part of the Local Option Law—it is permissible for railroads to transfer and deliver "Altar Wine" when for sacramental purposes; therefore when "Altar Wine," to be used for sacramental purposes, is delivered in good faith, agents are authorized to accept and deliver same, when destined to Local Option points named in this circular.

Please be governed accordingly.

ISSUED BY

D. M. GOODWYN,
General Freight Agent.

FILE No. 367073.

30 And afterwards, to-wit: at the November, 1897, Term of said Court, on the 21st day of April, 1908, before the Honorable Albert B. Anderson, Judge of said Court, the following further proceedings in the above entitled cause were had, to-wit:

*Decree and Injunction of April* 21, 1908.

This cause having by agreement of the parties been submitted, and now coming on to be heard by the court on the bill and answer and the court having heard the argument of counsel and being duly advised in the premises it is ordered, adjudged and decreed that the preliminary injunction or temporary restraining order heretofore granted in this cause be and the same is hereby made perpetual, and the defendant, its officers, agent and employees are hereby enjoined and inhibited from refusing to accept from the complainant beer shipped by it and consigned to points on its line of railway in local option districts in the state of Kentucky, and from refusing to ship and deliver such beer to the consignees at such points.

And afterwards, to-wit, at the May Term of said court on the 5th day of May, 1908, before the Honorable Albert B. Anderson, Judge of said court, the following further proceedings in the above entitled cause were had, to-wit:

*Petition for Appeal and Assignments.*

Comes now the defendant by Curran A. De Bruler, Esq., and Henry L. Stone, Esq., its solicitors, and files its petition for appeal and assignments of error herein in the words following, to-wit:

*Petition for Appeal to the United States Circuit Court of Appeals for the Seventh Circuit.*

The above named defendant, conceiving itself aggrieved by the decree made and entered on the 21st day of April, 1908, in the above styled cause, does hereby appeal from said order and decree to the Circuit Court of Appeals of the Seventh Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and prays that its appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Seventh Circuit.

Dated May 5th, 1908.

CURRAN A. DE BRULER,
HENRY L. STONE,
*Solicitors for Defendant.*

31 The foregoing claim for appeal is allowed.
Dated 5th day of May, 1908.

ALBERT B. ANDERSON,
*United States Judge for the District of Indiana.*

*Assignment of Errors.*

And now on this 5th day of May, 1908, came the above named defendant, Louisville & Nashville Railroad Company, and hereby petitions for an appeal, and assigns errors on the decree of the Circuit Court of the United States for the District of Indiana, in the above styled cause, dated on the 21st day of April, 1908, an states that the court erred in the decree aforesaid to the prejudice of the defendant in the following particulars:

I.

In not decreeing the dissolution of the preliminary injunction and the dismissal of complainant's bill, because the Vanderburgh Circuit Court of the State of Indiana, wherein this action was originally instituted, had no jurisdiction of the subject matter thereof.

II.

In not decreeing the dissolution of the preliminary injunction and a dismissal of complainant's action for want of equity in the bill, and because it is not shown thereby that complainant would suffer irreparable injury if the said injunction had not been granted, and complainant had an adequate remedy at law, if entitled to any remedy at all.

III.

In not decreeing that the Vanderburgh Circuit Court of the State of Indiana was without jurisdiction of the subject matter of this action, because the Interstate Commerce Commission has original and exclusive jurisdiction thereof.

32 IV.

In not decreeing that the order granting to complainant the preliminary injunction as prayed for in its bill is void, because it is a regulation of interstate commerce and affects property and rights of the parties beyond the territorial jurisdiction of the Vanderburgh Circuit Court or of the Circuit Court of the United States for the District of Indiana.

V.

In not decreeing that the rule or regulation established by the defendant that it would not accept or transport spirituous, vinous, malt or other intoxicating liquors from any point on its lines for delivery at any point on its lines, where the sale of such liquors is prohibited by law, and did not hold itself out as a common carrier of such liquors from any point to any such points, of which com-

plainant and all others engaged in like business, as well as the *re*-public at large, had due and ample notice prior to the institution of this action, was a reasonable and lawful rule or regulation, and operated to exempt the defendant as a common carrier of such liquors from any point on its lines to all such points, and relieved defendant of any duty of carrying the same, including the beer offered by complainant to the defendant at Evansville, Indiana, for shipment to destinations in local option districts and counties in Kentucky, where the sale of such liquors was and is prohibited by law, and the transportation to which points in Kentucky by defendant is prohibited by the laws of that State.

VI.

In not decreeing that the statute of Kentucky, prohibiting the transportation of spirituous, vinous, malt, or other intoxicating liquors, and the delivery thereof at places where the sale of such liquors is made unlawful by law, is valid as to the defendant, a corporation chartered under the laws of the state, and deriving all its powers and authority therefrom.

33 VII.

In ordering, adjudging and decreeing that the preliminary injunction or temporary restraining order granted by the Vanderburgh Circuit Court of Indiana be made perpetual, and in enjoining and inhibiting the defendant, its officers, agents, and employees from refusing to accept from complainant beer shipped by it and consigned to points on the defendant's line of railway in local option districts in the state of Kentucky, and from refusing to ship and deliver such beer to the consignees at such points.

CURRAN A. DE BRULER,
HENRY L. STONE,
*Solicitors for Defendant and Appellant, Louisville & Nashville Railroad Company.*

*Order Allowing Appeal.*

And thereupon said appeal is now by the court allowed, and the appellant files its appeal bond herein in the sum of two hundred and fifty dollars with Curran A. De Bruler as surety thereon, which bond is now by the court approved, and is in the words following, to-wit:

*Appeal Bond.*

Know all men by these presents, That we The Louisville & Nashville Railroad Company and Curran A. De Bruler are held and firmly bound unto the above named F. W. Cook Brewing Company in the sum of two hundred and fifty dollars to be paid to said F. W. Cook Brewing Company to which payment, well and truly to be

made, we bind ourselves jointly and severally, and our and each of our heirs, executors and administrators, jointly by these presents.

Sealed with our seals and dated this 5th day of May, 1908.

Whereas, the above named Louisville & Nashville Railroad Company hath prosecuted an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, to reverse the decree rendered in the above entitled suit, by the Circuit Court of the United States, for the District of Indiana: Now, therefore, the condition of this obligation is, that if the above named Louisville & Nashville Railroad Company shall prosecute its said appeal to effect and answer all costs and damages that may be adjudged or awarded against him
34 if he shall fail to make good his plea, then this obligation to be void; otherwise in full force.

THE LOUISVILLE & NASHVILLE
RAILROAD COMPANY, [SEAL.]
By C. A. DE BRULER, [SEAL.]
*Attorney in Fact.*
CURRAN A. DE BRULER. [SEAL.]

Sealed and delivered in presence of

——— ———.

Taken and approved by me this 5th day of May, 1908.
ALBERT B. ANDERSON, *Judge.*

*Certificate of Clerk.*

UNITED STATES OF AMERICA,
*District of Indiana, ss:*

I, Noble C. Butler, Clerk of the Circuit Court of the United States for the District of Indiana, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in said court in the cause entitled The F. W. Cook Brewing Company vs. Louisville & Nashville Railroad Company, as fully as the same appears of record and remains on file in my office.

Witness my hand and the seal of said court, at Indianapolis in said District, this 20th day of May, A. D. 1908.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

35 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the F. W. Cook Brewing Company and Geo. A. Cunningham, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit, to be held at the City of Chicago, in the State of Illinois, within thirty (30) days from the date of this writ, pursuant to the appeal filed

in the Clerk's office of the Circuit Court of the United States for the District of Indiana, wherein you are plaintiff and appellee, and the Louisville and Nashville Railroad Company is respondent and appellant, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America this the 5th day of May, A. D. 1908, and of the independence of the United States one hundred and thirty-three.

[SEAL.]

ALBERT B. ANDERSON,
*United States District Judge Presiding in the Circuit Court.*

Attest:
NOBLE C. BUTLER, *Clerk.*

Service of the within citation and receipt of a copy thereof admitted this the 5th day of May, A. D. 1908.

GEO. A. CUNNINGHAM,
*Solicitor for the F. W. Cook Brewing Company, Appellee and Complainant in the Lower Court.*

35½ United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 35, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the twenty-first day of July, 1908, on which this cause was argued, heard and determined in the case of Louisville & Nashville Railroad Company vs. The F. W. Cook Brewing Company, No. 1505, October Term, 1907, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this eighteenth day of May A. D. 1909.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
*Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

36 At a Regular Term of t United States Circuit Court of Appeals begun and held a the United States Court Rooms in the City of Chicago in said Seventh Circuit on the first day of October, A. D. nineteen hundred and seven, of the October term, in the year of our Lord One thousand nine hundred and seven, and of our Independence the one hundred and thirty-second.

And afterwards, to-wit: On the tenth day of August, 1908, in the October Term last aforesaid, the following proceedings were had and entered of record, to-wit:

MONDAY, *August* 10, 1908.

Before Hon. Peter S. Crosscup, Presiding Judge.

1505.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
F. W. COOK BREWING COMPANY.

Appeal from the Circuit Court of the United States for the District of Indiana.

On application of Mr. C. A. De Bruler, counsel for appellant, it is ordered that the time for filing brief for appellant in this cause be and is hereby extended to September 10, 1908.

And afterwards, to-wit: On the thirteenth day of August, 1908, in the October Term last aforesaid, came the Appellant by its counsel, Mr. Henry L. Stone and Mr. Curran A. De Bruler, and filed in the office of the clerk of this Court their appearances, which are in the words and figures following, to-wit:

37 United States Circuit Court of Appeals for the Seventh Circuit.

No. 1505.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
THE F. W. COOK BREWING COMPANY, Appellee.

The undersigned hereby enter their appearance as solicitors for appellant in the above entitled cause.

HENRY L. STONE,
CURRAN A. DE BRULER,
*Solicitors.*

Endorsed: Filed Aug. 13, 1908. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the twenty-first day of September, 1908, in the October Term last aforesaid, there was filed in the office of the clerk of this Court a certain Motion for extension of time for filing brief for Appellee and Affidavit of Percy C. Hopkins, which Motion and Affidavit are in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1907.

No. 1505.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
THE F. W. COOK BREWING COMPANY, Appellee.

The appellee, The F. W. Cook Brewing Company, moves the Court for an extension of thirty (30) days' time for the filing of its brief in the above-entitled cause, and in support of said motion files
38 herewith the affidavit of Percy C. Hopkins setting forth the grounds upon which such extension is asked, and the written consent of the appellant, Louisville & Nashville Railroad Company, to the granting thereof.

THE F. W. COOK BREWING COMPANY,
By MICHAEL D. ANSSMAN, *Sec'y & Treas.*

The appellant, the Louisville & Nashville Railroad Company hereby consents to the granting by the Court of thirty (30) days' additional time for the filing of appellee's brief in the above-entitled cause.

HENRY L. STONE,
C. A. DE BRULER,
*Attorneys for Appellant.*

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1907.

No. 1505.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
THE F. W. COOK BREWING COMPANY, Appellee.

PERCY C. HOPKINS, being duly sworn, upon his oath says:

That George A. Cunningham, of Evansville, Indiana, who is an attorney of this bar, was at the time of the filing of the original complaint herein, has ever since been, and now is sole counsel for the appellee, The F. W. Cook Brewing Company, in the above entitled cause. That the said Cunningham has been absent from the
39 city of Evansville and from the United States continuously since about the 15th day of July, 1908, spending his vacation

in England and on the continent of Europe. That he is believed to have sailed for home from the city of Antwerp on the 11th day of September, 1908, and is expected to arrive in the city of Evansville, Indiana, on or about the 25th day of September, 1908.

Affiant further states that he is informed and believes that the brief for appellant in said cause was filed in said Court on the 10th day of September, 1908, and that under the rules of the Court the appellee is required to file its brief within twenty (20) days from said last named date, or on or before September 30, 1908. That the time to intervene between the return of said Cunningham and the last date upon which appellee's brief should be filed will not be sufficient to enable said Cunningham to prepare, have printed and file the same.

Affiant further says that he is in the law-office of said Cunningham in the city of Evansville and is familiar with the facts above stated, but not with the issues in this cause, and that he makes this affidavit on behalf of the appellee and said Cunningham for the purpose of securing an extension of the time for the filing of the brief of the appellee in said cause. Affiant says that in his opinion an extension of at least thirty (30) days' time from September 30, 1908, will be necessary in order to enable said Cunningham to prepare and file on behalf of the appellee a brief properly presenting the issues in this cause.

PERCY C. HOPKINS.

UNITED STATES OF AMERICA,
*State of Indiana,*
*County of Vanderburgh,* ss:

Before me, Frank C. Gore, a notary public within and for said county and state, personally appeared Percy C. Hopkins, who duly subscribed the foregoing affidavit and made oath that the facts therein stated are true as he verily believes.

Witness my hand and notarial seal, this 15th day of September, A. D. 1908.

[SEAL.] FRANK C. GORE,
*Notary Public.*

My commission expires Nov. 19, 1911.

Endorsed: Filed Sep. 21, 1908. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the twenty-first day of September, 1908, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

MONDAY, *September* 21, 1908.

Before Hon. Peter S. Grosscup, Presiding Judge.

1505.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
THE F. W. COOK BREWING COMPANY.

Appeal From the Circuit Court of the United States for the District of Indiana.

On application of counsel for appellee, counsel for appellant consenting thereto, it is ordered that the time for filing brief for appellee in this cause be and is hereby extended thirty days.

41 At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, Begun and Held in the United States Court Room, in the City of Chicago, in said Seventh Circuit, on the Sixth Day of October, One Thousand Nine Hundred and Eight, of the October Term, in the Year of Our Lord One Thousand Nine Hundred and Eight, and of Our Independence the One Hundred and Thirty-third Year.

And afterwards, to-wit: On the twentieth day of November, 1908, in the October Term last aforesaid, there was filed in the office of the clerk of this Court, a certain Stipulation that the cause be set down for hearing, which Stipulation is in the words and figures following, to-wit:

NOVEMBER 18, 1908.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

In No. 1505, Louisville & Nashville Railroad Co., appellant, v. The F. W. Cook Brewing Co., appellee, the undersigned, who are counsel for the parties respectively, respectfully request the Court to set this case for oral argument on Tuesday, December 15, 1908, and if that date does not suit the convenience of the Court, to fix a day for the argument on any date in January, 1909.

C. A. DE BRULER,
*Attorney for Appellant.*
GEO. A. CUNNINGHAM,
*Attorney for Appellee.*

Endorsed: Filed Nov. 20, 1908. Edward M. Holloway, Clerk.

42 And afterwards, to-wit: On the fourth day of December, 1908, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court a certain Stipulation as to the time of hearing cause, which Stipulation is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1908.

No. 1505.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
THE F. W. COOK BREWING COMPANY, Appellee.

*Stipulation.*

It is hereby stipulated and agreed between counsel for appellant and appellee that the Court may assign on January 5, 1909, this case for oral argument to any day in the latter part of January or in the month of February, 1909, that will suit the convenience of the Court.

This November 23, 1908.

HENRY L. STONE,
*Counsel for Appellant.*
GEO. A. CUNNINGHAM,
*Counsel for Appellee.*

Endorsed: Filed Dec. 4, 1908. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the twenty-ninth day of December, 1908, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court, a certain Stipulation as to date of hearing, which Stipulation is in the words and figures
43 following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1908.

No. 1505.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
THE F. W. COOK BREWING COMPANY, Appellee.

*Stipulation.*

It is hereby stipulated and agreed between counsel for appellant and appellee that the Court may, on January 5, 1909, assign this cause for oral argument to any day in the week beginning on the 8th day of February, 1909, that will suit the convenience of the Court.

This December 28, 1908.

H. L. STONE,
FREY & DE BRULER,
*Counsel for Appellant.*
GEO. A. CUNNINGHAM,
*Counsel for Appellee.*

Endorsed: Filed Dec. 29, 1908. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the fifth day of January, 1909, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

44 TUESDAY, *January* 5, 1909.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

Before:

Hon. Peter S. Grosscup, Circuit Judge.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.

1505.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
THE F. W. COOK BREWING COMPANY.

Appeal from the Circuit Court of the United States for the District of Indiana.

It is ordered by the Court that this cause be, and the same is hereby set down for hearing on February 9, 1909.

And afterwards, to-wit: On the ninth day of February, 1909, in the October Term last aforesaid, came the Appellant by its counsel, Mr. Philip W. Frey, and filed his appearance which is in the words and figures following, to-wit:

45 United States Circuit Court of Appeals for the Seventh Circuit, Oct. Term, 1908.

No. 1505.

LOUISVILLE & NASHVILLE RAILROAD CO.
vs.
F. W. COOK BREWING CO.

The Clerk will enter my appearance as Counsel for the Appellant.
PHILIP W. FREY,
*Evansville, Ind.*

Endorsed: Filed Feb. 9, 1909. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the ninth day of February, 1909, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, *February* 9, 1909.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

1505.

LOUISVILLE & NASHVILLE RAILWAY COMPANY
vs.
F. W. COOK BREWING COMPANY.

Appeal from the Circuit Court of the United States for the District of Indiana.

Now this day comes Mr. Philip W. Frey and enters his appearance in this cause for the appellant herein in lieu of Mr. C. A. De Bruler.

46 1505.

LOUISVILLE & NASHVILLE RAILWAY COMPANY
vs.
F. W. COOK BREWING COMPANY.

Appeal from the Circuit Court of the United States for the District of Indiana.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. Philip W. Frey, counsel for appellant, and by Mr. George A. Cunningham, counsel for appellee, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the thirteenth day of April, 1909, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, *April* 13, 1909.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Christian C. Kohlsaat, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

Before:

Hon. Peter S. Grosscup, Circuit Judge.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.

1505.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
THE F. W. COOK BREWING COMPANY.

Appeal from the Circuit Court of the United States for the District of Indiana.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Indiana and was argued by counsel.

On Consideration whereof, It is now here ordered, adjudged
47 and decreed by this Court that the decree of the said Circuit Court in this cause, be and the same is hereby affirmed with costs.

And afterwards, on the same day, to-wit: On the thirteenth day of April, 1909, in the October Term last aforesaid, there was filed in the office of the clerk of this Court, the Opinion of this Court, which is in the words and figures following, to-wit:

48 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1908; January Session, A. D. 1909.

No. 1505.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
THE F. W. COOK BREWING COMPANY.

Appeal from the Circuit Court of the United States for the District of Indiana.

Before Grosscup, Baker, and Seaman, Circuit Judges.

The facts are stated in the opinion.

BAKER, *Circuit Judge*, delivered the opinion of the court.

On bill and answer a decree was entered restraining appellant from refusing to accept interstate shipments tendered by appellee. The facts from which arise the questions necessary to be answered are these: Appellee is an Indiana corporation operating a brewery at Evansville. Appellant is a Kentucky corporation doing business as an interstate carrier on an interstate railroad extending through Indiana and Kentucky. In 1906 Kentucky passed an act declaring it to be unlawful for carriers to bring intoxicating liquors into any county or district where the sale of such liquors had been legally prohibited. In 1907, shortly before appellee filed its bill, appellant published a circular, posted it in stations, and filed it with the Interstate Commerce Commission, directing appellant's agents to refuse to accept shipments of intoxicating liquors, whether intrastate or interstate, destined to points within Kentucky prohibition territory. Before this, appellant shipped beer for appellee to all Kentucky points on its line (from which fact we deduce
49 that appellant had duly made and published proper classifications and rates for such shipments). After the issuance of the circular aforesaid, appellant refused to accept appellee's beer shipments to prohibition points, though the full freight charges were tendered in advance, but continued to accept such shipments to non-prohibition points. Appellee filed its bill in the State court at Evansville.

The contention that appellee's remedy, if any, was limited to proceedings before the Interstate Commerce Commission, we deem untenable. No complaint was made that the beer rates were unreasonable either in themselves or on comparison with rates for other commodities, or that appellee was subjected to any undue disadvantage in its competition with other brewers, or that Evansville was discriminated against. Any such complaint would go to the Commission. But the suit here was based on appellant's refusal to carry

under any circumstances goods of a class for which appellant had made generally a classification and rate. Whether the refusal to carry the property in question, like a refusal to carry some person, was justified or not, we believe is a question of common law, not an interpretation and application of any provision of the Interstate Commerce Act. And the Act itself provided that nothing therein should in any way abridge the remedies at common law. See Danciger v. Wells, Fargo & Co., 154 Fed., 379.

Jurisdiction (resting upon the original jurisdiction of the State court) is further assailed on the ground that the decree affects property and rights of appellant beyond the territorial reach of the court. The State court, and the Federal court on removal, had full jurisdiction of appellant's person. The suit was in personam. The act complained of was appellant's refusal in Indiana to accept in Indiana goods for shipment into Kentucky. That part of the decree which directs the performance of acts in Indiana is beyond the scope of the attack. Therefore the decree should not be vacated (nor modified, since no motion to modify was made) even if there were any merit in the contention that the command to make deliveries in Kentucky was erroneously included in the decree.

We find nothing in the case to justify appellant's refusal. Beer is recognized by the law of the land as a commodity in which persons may deal as freely as in other commodities except to the extent that such traffic is restrained or prohibited by express legis-
50 lation. The Kentucky legislation was effective only as an exercise of local police power; as a regulation of interstate commerce it was utterly void. Cincinnati, etc., R. Co. v. Commonwealth, — Ky., —, 104 S. W. Rep., 394; Heyman v. Southern R. Co., 203 U. S., 270. And under the Wilson Act (26 Stat., 313) the local police power could not attach until after delivery of the beer to the Kentucky consignee. Foppiano v. Speed, 199 U. S., 501, 517; Heyman v. Southern R. Co., supra.

In support of its reliance upon the Kentucky statute appellant in its answer alleged that as a Kentucky corporation it had covenanted with Kentucky to obey the Kentucky laws. If as between Kentucky and appellant the promise was meant to include void statutes, the right of Indiana citizens to require appellant to perform fully its duty as an interstate carrier under the laws applicable to interstate commerce could not be thereby altered or diminished. For otherwise appellant would be endowing the Kentucky legislature with a power forbidden it by the Federal Constitution.

The answer attempted a further justification on the ground that the promulgation and enforcement of appellant's aforesaid circular was "in the exercise of its power as a common carrier to make reasonable rules and regulations as to the kind of goods and commodities which it would transport and carry as such common carrier." Conceding the power to the full extent stated in the numerous authorities cited by appellant (see 5 A. & E. Ency. of Law, 2nd Ed., 162, as illustrative), we find no facts either in the answer or the bill on which to base the reasonableness of the promulgated rule. As a

mere transportation problem there was no difference between carrying a case of beer to a "wet" Kentucky county and carrying one to the adjoining "dry" county. Appellant did not claim that it was not equipped or did not choose to carry that class of property. On the contrary appellant's general practice was to accept such traffic. In argument it was suggested that a good reason for making the difference between beer shipments to "wet" and to "dry" counties might be found in the damage to its business which appellant might suffer from fines, costs, withdrawal of patronage, punitive regulations, etc., if it should fail to obey the void Kentucky statute. That is speculation for which we find no warrant in the record. The bill averred that the statute, so far as it affected interstate commerce, was held void in the first case that arose, and that all the railroads in Kentucky except appellant had been carrying beer to
51 "dry" counties without any prosecutions being instituted. The answer merely stated that appellant "would render itself liable to prosecution." Appellant did not even allege a belief that prosecutions would be undertaken, much less that they would end in fines, or that other evil consequences would follow. And such an apprehension, if speculation is to be indulged, would probably be groundless unless appellant should voluntarily go beyond its province of carrier and make itself a party to illegal sales after the transportation was ended—a thing conceivable in "wet" as well as in "dry" counties. So the reasonableness of the rule really comes back to rest on appellant's mere desire to carry out the policy exhibited in the void, as well as in the valid, part of the Kentucky statute. While this may be not uncommendable in appellant as a Kentucky corporation, at the same time appellant as an interstate carrier should not overlook the fact that the paramount Congressional policy stands expressed in the Wilson Act.

The decree is

Affirmed.

A true Copy.

Teste:

_____,

*Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

52 And afterwards, to-wit: On the thirteenth day of May, 1909, in the October Term last aforesaid, there was filed in the office of the clerk of this Court a certain Petition for Appeal, which Petition for Appeal is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1908; January Session, 1909.

No. 1505.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
THE F. W. COOK BREWING COMPANY, Appellee.

*Petition for Appeal to the Supreme Court of the United States.*

To the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Your petitioner, the Louisville & Nashville Railroad Company, appellant in the above styled cause, conceiving itself aggrieved by the final decree of this Court, rendered April 13, 1909, in favor of the F. W. Cook Brewing Company, appellee in the above entitled cause, does hereby appeal from said decree to the Supreme Court of the United States for the reasons and upon the grounds specified in its Assignment of Errors, which is presented and filed herewith.

Wherefore, your petitioner prays for an order allowing said appeal, and that a transcript of the record and proceedings, upon which said decree was made, duly authenticated, may be sent
53 to the Supreme Court of the United States, as prescribed by law.

HENRY L. STONE,
*Counsel for Appellant, Louisville & Nashville Railroad Company.*

FREY & DE BRULER,
*Of Counsel.*

Endorsed: Filed May 13, 1909. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the thirteenth day of May, 1909, in the October Term last aforesaid, there was filed in the office of the clerk of this Court a certain Assignment of Errors, which Assignment of Errors is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1908; January Session, 1909.

No. 1505.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
THE F. W. COOK BREWING COMPANY, Appellee.

*Assignment of Errors.*

And now on this 13th day of May, 1909, comes the appellant, the Louisville & Nashville Railroad Company, by Henry L. Stone, Philip W. Frey and George R. De Bruler, its counsel, and says that in the decree rendered by the United States Circuit Court of Appeals for the Seventh Circuit, in the above entitled cause, on April 13, 1909, and in the record and proceedings in said cause in said Court, there is manifest error as set forth in this, its Assignment of
54 Errors, which is presented and filed simultaneously with its Petition for Appeal, as follows:

I.

The said Circuit Court of Appeals erred in not reversing the decree of the Circuit Court of the United States for the District of Indiana appealed from rendered April 21, 1908, in the suit in equity of The F. W. Cook Brewing Company, complainant, against the Louisville & Nashville Railroad Company, defendant, originally instituted in the Circuit Court of Vanderburgh County, in the State of Indiana, and thence removed to the said United States Circuit Court, because the latter court on final hearing erred in not dissolving the preliminary injunction and dismissing the said complainant's bill, on the ground that said Vanderburgh Circuit Court of the State of Indiana had no jurisdiction of the subject-matter thereof.

II.

The said Circuit Court of Appeals erred in not reversing the said decree of the United States Circuit Court, because it erred in not decreeing the dissolution of the preliminary injunction and a dismissal of said complainant's suit for want of equity in the bill, and it was not shown thereby that said complainant would suffer irreparable injury if the injunction were not granted, and when said complainant had an adequate remedy at law, if entitled to any remedy at all.

III.

The said Circuit Court of Appeals erred in affirming the said decree of the said United States Circuit Court on the ground that the refusal of appellant to carry the beer of the appellee to certain destinations in the State of Kentucky was a question of common
55 law, not involving an interpretation or application of any provision of the Interstate Commerce Act, and in not revers-

ing the same on the ground that the Interstate Commerce Commission had original and exclusive jurisdiction of the subject-matter of the complaint, and that neither the said Vanderburgh Circuit Court nor the said United States Circuit Court had original jurisdiction thereof.

IV.

The said Circuit Court of Appeals erred in upholding the jurisdiction of the State Court and of the said Circuit Court by their orders and decrees to affect property and rights of appellant beyond the territorial reach of said Courts, and further erred in not vacating or modifying the decree appealed from, in so far as it commanded and required appellant to transport and make deliveries of beer to consignees at points in Kentucky where the sale thereof was and is prohibited by law.

V.

The said Circuit Court of Appeals erred in not reversing the decree of said Circuit Court on the ground that the rule or regulation established by appellant that it would not accept for transportation or transport spirituous, vinous, malt or other intoxicating liquors from any point on its lines for delivery at any point on its lines, where the sale of such liquors is prohibited by law, and did not hold itself out as a common carrier of such liquors from any point to any such points, of which appellee and all others engaged in like business, as well as the public at large, had due and ample notice, prior to the institution of this suit, was a reasonable and lawful rule or regulation, and operated to exempt appellant as a common carrier of such liquors from any point on its lines to all such points, and re-
56 lieved appellant of any duty of carrying the same, including the beer offered by appellee at Evansville, Indiana, for shipment to destinations in local option or prohibition districts and counties in the State of Kentucky, where the sale of such liquors was and is prohibited by law, and the transportation to which points by appellant is prohibited by the laws of that State.

VI.

The said Circuit Court of Appeals erred in not reversing the decree appealed from on the ground that the Statute of the State of Kentucky, approved March 21, 1906, referred to in appellant's answer, and a copy of which is made Exhibit A therewith, which prohibits the transportation by a public or private carrier of spirituous, vinous, malt and other intoxicating liquors, and the delivery thereof at places where the sale of such liquors is made unlawful by law, is valid as to appellant, a corporation incorporated and existing under the laws of that State, and deriving all its powers and authority therefrom.

VII.

The said Circuit Court of Appeals erred in not sustaining each of the errors assigned on appellant's appeal from the decree of said

Circuit Court, and in not reversing the said decree making perpetual the preliminary injunction or temporary restraining order granted by the Vanderburgh Circuit Court of the State of Indiana, and ordering, adjudging and decreeing that appellant, its officers, agents and employés be perpetually enjoined and inhibited from refusing to accept from appellee beer offered for shipment by appellant and consigned to points on appellant's lines in local option districts or prohibition territory in the State of Kentucky, and from refusing to ship and deliver such beer to the consignees at such points
57 in that State.

HENRY L. STONE,
*Counsel for Appellant, Louisville & Nashville Railroad Company.*

FREY & DE BRULER,
*Of Counsel.*

Endorsed: Filed May 13, 1909. Edward M. Holloway, Clerk.

And afterwards on the same day, to-wit: On the thirteenth day of May, 1909, in the October Term last aforesaid, there was filed in the office of the clerk of this Court a certain Bond on Appeal, which Bond on Appeal is in the words and figures following, to-wit:—

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1908; January Session, 1909.

No. 1505.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
THE F. W. COOK BREWING COMPANY, Appellee.

*Bond on Appeal.*

Know All Men By These Presents: That we, Henry L. Stone and William G. Dearing, of the County of Jefferson, State of Kentucky, are held and firmly bound unto The F. W. Cook Brewing Company in the sum of Three Hundred ($300) Dollars, to be paid to the said Brewing Company, and we bind ourselves and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

58 Sealed with our seals and dated the 12th day of May, 1909.

Whereas, the appellant Louisville & Nashville Railroad Company in the above styled suit has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the Circuit Court of Appeals for the Seventh Circuit on the 13th day of April, 1909.

Now, therefore, the condition of this obligation is such that if the said appellant shall prosecute said appeal to effect and answer all

costs if it fails to make said appeal good, then this obligation shall be void; otherwise to remain in full force and virtue.

HENRY L. STONE. [SEAL.]
WILLIAM G. DEARING. [SEAL.]

Sealed and delivered in presence of:

W. A. NORTHCOTT.
C. W. SHAFT.

STATE OF KENTUCKY,
*Jefferson County, sct:*

Henry L. Stone and William G. Dearing, sureties named in the foregoing bond, being first duly sworn, each for himself says:

That he is a resident and freeholder in the County and State aforesaid, and is worth the sum of Three Hundred ($300) Dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

HENRY L. STONE.
WILLIAM G. DEARING.

Subscribed and sworn to before me, as witness my hand and official seal, this the 12th day of May, 1909.

My commission expires on the 29th day of January, 1910.

[SEAL.] G. W. B. OLMSTEAD,
*Notary Public, Jefferson County, Ky.*

The foregoing bond is approved, this the 13th day of May, 1909.

P. S. GROSSCUP,
*United States Circuit Judge, Seventh Circuit.*

Endorsed: Filed May 13, 1909. Edward M. Holloway, Clerk.

59 And afterwards on the same day, to-wit: On the thirteenth day of May, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

THURSDAY, *May* 13, 1909.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

Before: Hon. Peter S. Grosscup, Circuit Judge.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
THE F. W. COOK BREWING COMPANY.

Appeal From the Circuit Court of the United States for the District of Indiana.

The above named appellant, Louisville & Nashville Railroad Company, having prayed an appeal from the decree rendered by this Court in the above styled cause on April 13, 1909, to the Supreme Court of the United States, and said appellant having presented and filed its Petition for Appeal, together with its Assignment of Errors, and an Appeal Bond, which bond has been duly approved by the Court:

It is now ordered, adjudged and decreed by the Court that such appeal be granted and allowed, and that a transcript of the record and proceedings upon which said decree was made, duly authenticated, be sent to the Supreme Court of the United States, as prescribed by law.

60 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 24, inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel) in the case of Louisville & Nashville Railroad Company vs. The F. W. Cook Brewing Company, No. 1505, October Term, 1907, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-first day of May A. D. 1909.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
*Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

61 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1908; January Session, 1909.

No. 1505.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
THE F. W. COOK BREWING COMPANY, Appellee.

*Citation.*

To The F. W. Cook Brewing Company:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Seventh Circuit, wherein the Louisville & Nashville Railroad Company is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Peter S. Grosscup, Judge of the United States Circuit Court of Appeals for the Seventh Circuit, this the 13th day of May, 1909.

P. S. GROSSCUP,
*Judge United States Circuit Court of Appeals, Seventh Circuit.*

Service of the above is this day accepted May 18th, 1909.

GEORGE A. CUNNINGHAM,
*Attorney for Appellee.*

Endorsed on cover: File No. 21,713. U. S. Circuit Court Appeals, 7th Circuit. Term No. 238. Louisville & Nashville Railroad Company, appellant, vs. The F. W. Cook Brewing Company. Filed June 7th, 1909. File No. 21,713.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 64.

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LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - - *Appellant,*

*vs.*

THE F. W. COOK BREWING COMPANY, - - *Appellee.*

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Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

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## Motion of Parties by their Counsel to Submit, Under Rule 20, on Briefs Filed, Without Oral Argument.

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FREY & DeBRULER,
HENRY L. STONE,
*Attorneys for Appellant.*
GEORGE A. CUNNINGHAM,
*Attorney for Appellee.*

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

17



# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1911.**

**No. 64.**

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LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - - *Appellant,*

*vs.*

THE F. W. COOK BREWING COMPANY, - - *Appellee.*

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## BRIEF FOR APPELLANT.

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Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

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HENRY L. STONE,
*Attorney for Appellant.*

PHILIP W. FREY,
GEORGE R. DeBRULER,
*Of Counsel.*

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 64.

---

Louisville & Nashville Railroad Company, - Appellant,

*vs.*

The F. W. Cook Brewing Company, - - - Appellee.

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## BRIEF FOR APPELLANT.

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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### STATEMENT OF CASE.

On April 1, 1907, the appellee, The F. W. Cook Brewing Company, a corporation organized and existing under the laws of Indiana, engaged in the manufacture of beer, an intoxicating liquor, at Evansville, in that State, and in the sale thereof in said city and State, and other States, filed its complaint in equity in the Vanderburgh Circuit Court of Indiana against the appellant, Louisville &

Nashville Railroad Company, a corporation organized and existing under the laws of Kentucky, engaged in the transportation by railroad of freight between the States of Indiana, Kentucky and other States.

## THE BILL OF COMPLAINT.

In its said complaint (Record, 2-6) appellee alleged, in substance, that it had had for many years a large trade in Kentucky in the sale of beer manufactured by it, confined principally to towns and cities in that State; that appellant until shortly before the filing of its said complaint had accepted shipments, packages or cases, of beer to appellee's customers in Kentucky over its lines on the payment of the usual and customary freight charges, and had transported and delivered the same to the consignees without question or *discrimination;* that in the month of March, 1907, appellee had tendered to appellant certain shipments of beer accompanied by proper shipping directions, and offered to pay the usual and customary freight charges thereon, to customers at different named towns and cities in Kentucky, some of which it is alleged appellant accepted for shipment, but subsequently refused to ship and returned the same to appellee, and others of which appellant refused to receive or to ship as demanded by appellee; and appellant had on March 29, 1907, wholly refused to receive such shipments of beer, and notified appellee in writing that thereafter and until further advised appellant would refuse all shipments of beer to all points on its lines in the State of

Kentucky known as local option points; that all the points in Kentucky to which appellee had been refused shipments were located on appellant's line of railroad, and situated within counties or districts known as local option districts, in which, under the laws of Kentucky, the sale of intoxicating liquors was prohibited; that said laws did not apply to sales and shipments made by persons engaged in interstate commerce nor to the shipments of beer offered by appellee to appellant, but that under said laws it was lawful for appellee to ship and deliver beer to its customers at the places mentioned in Kentucky; that while said points of destination were in so-called prohibition counties and districts, where by vote of the people the sale of intoxicating liquors at the dates said shipments were tendered was prohibited, still it was lawful under the laws of Kentucky for persons having unexpired liquor licenses to sell such liquors until their licenses expired; that at said dates the persons to whom appellee had sold beer and to whom the same was consigned had unexpired licenses for the sale of intoxicating liquors in the respective counties in which said places were situated; that appellant had refused and still refused to make shipments of beer tendered by appellee from Evansville, Indiana, to all so-called prohibition counties or districts in Kentucky, without regard to the fact that in many of said counties, particularly at the points stated in the complaint, appellee had customers who had unexpired licenses under which it was lawful to sell intoxicating liquors in said counties and districts; that the Illinois Central Railroad Company and, so far

as appellee was advised, other railroad companies received beer and other intoxicating liquors at points outside of Kentucky and delivered the same at any point within that State on their lines, whether the same were in local option districts or not; that appellant, so far as appellee was advised, was the only common carrier engaged in the business of transporting merchandise into and out of Kentucky which refused to transport beer from points outside of that State to local option points therein; that appellant had not been subjected to prosecution, and appellee averred its belief that the shipments of appellee's beer as requested would not subject appellant to any liability under the laws of Kentucky, or any prosecution on account thereof; that appellee was advised that there had been no prosecutions instituted in Kentucky on account of such shipments, except in the Circuit Court of Calloway County, Kentucky, against the Southern Express Company, for having delivered to a consignee in a local option district of that county intoxicating liquors shipped by a consignor at Jackson, Tennessee, in which case said circuit court had held that the laws of Kentucky did not apply to such shipments of intoxicating liquors; that it was the policy and purpose of appellant, and, unless restrained and inhibited by the court, it would continue to refuse shipments of beer offered by appellee as aforesaid; that by such refusal appellee was and would continue to be unable to fill orders given it by its said customers thereby causing it to lose business and trade established as above stated, and to suffer great and irreparable loss; that in the usual

course of its business, appellee received orders from its customers in Kentucky for beer every few days, by reason whereof an emergency existed for the granting of a temporary restraining order, without awaiting notice to appellant of the application therefor, and if the granting of a temporary restraining order was delayed until the final hearing of the cause and until notice could be regularly given to appellant, the apellee would suffer great and irreparable loss and injury.

Wherefore, appellee prayed that appellant, its officers, agents, servants, and employes be enjoined and inhibited from refusing to receive and ship to local option or other points in Kentucky, on its lines of railroad, shipments of beer tendered by appellee, accompanied by the usual and customary freight charges, and from refusing to grant to appellee the same facilities for the shipment of beer to local option or other points in Kentucky as were granted to other shippers, and from refusing to perform and discharge to appellee the duties it owed to it, as a common carrier, and from *discriminating* against appellee in the shipment of its beer on account of the character of appellee's business or otherwise.

## THE RESTRAINING ORDER.

Upon the same day the complaint was filed, summons was issued thereon and served on one of appellant's agents in Vanderburgh County, Indiana, and notice was given by appellee's attorney to appellant's general

freight agent in that county that appellee would at two o'clock p. m. on that day apply to the Vanderburgh Circuit Court for a temporary restraining order restraining appellant from declining and refusing to accept shipments of beer offered by appellee to appellant to points in Kentucky. (R. 7.)

At the hearing of said application, at the time stated, the judge of said Circuit Court having examined appellee's complaint, which was verified, granted a temporary restraining order, whereby appellant, its officers, agents, servants and employes, were enjoined and inhibited from refusing to receive and ship to local option or other shipping points on the line of its railroad in Kentucky beer tendered by appellee in proper condition for shipment, and accompanied by the usual and customary freight charges, whether in carload lots or otherwise, and from refusing to grant to appellee the same facilities for the shipment of beer to local option points in Kentucky that were furnished for the shipment of beer to other points in that State, and from refusing to perform and discharge to appellee the same duties it owed and performed to shippers generally, and from *discriminating* against appellee in the shipment of its beer, either on account of the character of appellee's business or otherwise, and from refusing to receive, ship and deliver all shipments of beer offered or tendered by appellee for points on its railroad in Kentucky, whether the same be in local option districts or not, provided such shipments shall be in proper form and condition, and

accompanied by the payment or tender of the usual and ordinary freight charges therefor.

To the issuance of this restraining order appellant by its attorneys objected, and asked time until the following morning to file its petition and bond for the removal of this cause to the Circuit Court of the United States for the District of Indiana, and for presenting to the court the question whether or not the complaint stated facts sufficient to entitle appellee to the restraining order aforesaid, and filed the affidavit of one of its attorneys in support of said request, but the Judge of the Circuit Court of Vanderburgh County overruled and denied said motion and request, to which ruling appellant excepted. (R. 7-8.)

## REMOVAL FROM THE STATE COURT.

On April 3, 1907, appellant withdrew said affidavit, and filed its petition and bond to remove the cause to the said Circuit Court of the United States, which bond was approved, and an appropriate order of removal was entered by the Vanderburgh Circuit Court. (R., 9-11.)

Thereafter, in the said Circuit Court, to which the cause was removed, appellant filed its answer, with two Exhibits A and B. (R., 12-23.)

## THE ANSWER.

Appellant, while reserving to itself all benefit of exception that could or might be had or taken to the many

errors, uncertainties, and imperfections in the said bill of complaint contained, in substance alleged in its answer:

(1) That, prior to the tender of the intoxicating liquor by appellee to appellant and before any of the occurrences or grievances described in appellee's bill of complaint had occurred, the Legislature of Kentucky, by an Act approved March 21, 1906, entitled "An Act to regulate the carrying, moving, delivering, transferring or distributing of intoxicating liquors in local option districts," made it unlawful for any person or persons, individual or corporation, public or private carrier, to bring into or transfer to any other person or persons, corporation, carrier or agent, or to deliver or distribute in any county, district, precinct, town or city, where the sale of intoxicating liquors had been prohibited, or may be prohibited, whether by special act of the General Assembly, or by vote of the people under the local option law, any spirituous, vinous, malt or other intoxicating liquors, regardless of the name by which it might be called, provided that said Act should apply to all packages of such intoxicating liquors, whether broken or unbroken, and that any person, individual or corporation, public or private carrier violating the provisions of said Act should be deemed guilty of violating the local option law, and should be fined not less than $50 nor more than $100 for each offense; and that the place of delivery of such liquors should be held to be the place of sale, and that each package of such liquors, so brought into or transferred to any other person, corporation,

carrier, or agent, delivered or distributed in such local option territory should constitute a separate offense. A copy of this Act was made Exhibit A with appellant's answer. (R., 16-17.)

This Act is now Sec. 2569a, Kentucky Statutes. (Carroll's Ed. 1909.)

Appellant further averred that each and all the points or places in Kentucky mentioned in appellee's bill of complaint were points and places where, under the laws of that State, and by the vote of the people of such towns or places, the sale of intoxicating liquor of any character was unlawful, and that appellant, should it receive from appellee any intoxicating liquor of any kind and transport the same to such points or places in Kentucky, would render itself liable to prosecution by indictment in that State for violating the Act aforesaid, which was in full force and effect long prior to the time when appellee tendered to appellant such intoxicating liquor to be transported by appellant into the prohibition districts and places described in the complaint.

(2) Appellant further averred that after the passage of said Act of the Kentucky Legislature, and prior to the tender by appellee to appellant of intoxicating liquor as aforesaid to be transported to points in that State in local option districts, *appellant in the exercise of its power as a common carrier to make reasonable rules and regulations as to the kind and character of goods and commodities which it would transport and carry as such common carrier, gave notice to the public, including the appellee, that it would not receive or carry intoxicating*

*liquor of any character to any points or places within prohibition or local option territory, such as described in appellee's complaint;* that such public notice was given to appellee by filing with appellant's local agent at Evansville, Indiana, a circular open to the inspection of the public, that it would not accept or transport intoxicating liquor of any character to the large number of places in Kentucky enumerated in said circular, which included the names of the places described in appellee's complaint; that such notice was given to the public by circular No. N. S. 2221, dated June 13, 1906, signed by D. M. Goodwyn, General Freight Agent of appellant, which was sent to each freight agent of appellant at all stations on its lines, including Evansville, Indiana, and was kept by said agents for the inspection of the public, and sent to each one of appellant's connecting lines, and filed with the Interstate Commerce Commission.

That from time to time, after the date last mentioned, circulars similar in all respects to the first one were issued by appellant and placed in the hands of all its freight agents and filed with said Commission, the said succeeding circulars only differing from the first one issued in the fact that they included more points and places in Kentucky in which sales of intoxicating liquor were prohibited from time to time under the local option law of that State. A copy of the circular which was in force before and at the time of the tender by appellee to appellant of the intoxicating liquor described in its complaint, and when this suit was brought, was made Exhibit B with appellant's answer. (R., 18-23.)

Appellant in its answer further alleged that appellee was also *personally* notified by the proper officers of appellant at Evansville, Indiana, that no beer or other intoxicating liquor would be shipped by appellant from Evansville, Indiana, to any of the points or places described in appellee's complaint, and that such notice was given *before* the tender by appellee of the beer described in its complaint.

(3) Appellant further alleged that it was a corporation chartered by the laws of Kentucky; that it had done and was at the bringing of this suit, and was still doing business under and by authority of its said charter and the amendments thereto, and the laws of that State applicable thereto, and under no other authority; that its original charter was granted by a special Act of the Kentucky Legislature, approved March 5, 1850, which had been at various times amended by said legislature; that the present Constitution of Kentucky, which went into effect September 28, 1891, prohibited the granting of special charters to corporations, and provided that the legislature should pass a general corporation act; that Section 190 of said Constitution provides that no corporation in existence at the time said Constitution was adopted should have the benefit of any future legislation without first filing in the office of the Secretary of State an acceptance of its provisions; that at the first session of the legislature after the adoption of said Constitution, a General Corporation Act was passed, which act, together with the amendments thereto, then constituted Sections 538 to 883a, inclusive, of the Ken-

tucky Statutes, Edition of 1903; that Section 570, Kentucky Statutes (being a part of said General Corporation Act), provides that no law shall be passed for the benefit of or in the interest of any corporation theretofore created or organized under the laws of Kentucky or any other State, and that no corporation shall avail itself of said Act, unless such corporation shall have previously, by a resolution adopted by its board of directors and filed in the office of the Secretary of State, accepted the provisions of said Constitution; that thereafter on July 11, 1902, appellant, in the manner thus prescribed by statute, duly accepted the provisions of said Constitution and said General Corporation Act; that by reason of said acts appellant was a Kentucky corporation, deriving all its powers and authority from the Constitution and laws of that State, and had no right to carry on any business, except such as it was authorized to do by the laws of Kentucky, including the Act, a copy of which was made Exhibit A with its answer, prohibiting it from transporting intoxicating liquor as aforesaid, which formed a part of its charter, and was valid and binding upon appellant in so far as it prohibited it from carrying any intoxicating liquor and delivering the same to any person at points where the sale thereof was unlawful.

(4) Appellant specifically denied the allegation in appellee's complaint that all the persons to whom its shipments of beer tendered to appellant for transportation had at the time unexpired licenses to sell intoxicating liquors in their respective counties or districts, and

further averred that if the shipments so tendered were consigned to *any* persons having at the time unexpired liquor licenses, such licenses had long since expired, and there were *no* persons in said prohibition counties or districts then engaged in the sale of intoxicating liquors under licenses which had *not* expired.

Appellant further alleged that the restraining order issued by the Vanderburgh Circuit Court, and then still in force, commanded appellant to receive and ship intoxicating liquors to any and all points in the prohibition districts and counties in Kentucky set forth in the complaint, without regard to the question whether the intoxicating liquor thereafter so tendered by appellee for shipment was consigned to persons engaged in the sale of intoxicating liquors having expired or unexpired licenses at the time of such tender.

## TARIFF CIRCULAR FILED WITH INTERSTATE COMMERCE COMMISSION.

The circular of the General Freight Agent addressed to agents, made Exhibit B with appellant's answer sets out the Act of the Legislature aforesaid; and directs that in the event agents at receiving points, through error, received a shipment for a local option point, when it reached that point the agent at said point of delivery, knowing that local option laws were in effect there, should decline to make delivery and notify forwarding agent that shipment were undelivered on account of local option laws, and ask for instructions as to disposition. A

full alphabetical list of local option towns and cities on appellant's lines in Kentucky is given in this circular, to which it directs that shipments of intoxicating liquors should not be billed, and that forwarding agents should refuse to accept such shipments when offered, destined to any of these points, all of which directions were by the terms of said circular expressly made applicable to interstate as well as intrastate shipments, and at the close thereof agents were admonished to govern themselves accordingly. (R. 18-23.)

No exceptions were taken to any of the allegations of the answer, nor was any replication filed thereto. All facts well pleaded therein were, therefore, admitted by appellee to be true.

## DECREE OF THE CIRCUIT COURT OF THE UNITED STATES.

On April 21, 1908, the cause was submitted by agreement of parties for final decree on the bill and answer, and the following decree was then passed by the court below. (R. 24):

> This cause having by agreement of the parties been submitted, and now coming on to be heard by the court *on the bill and answer,* and the court having heard the argument of counsel, and being duly advised in the premises, it is ordered, adjudged and decreed that the preliminary injunction or temporary restraining order heretofore granted in this cause be and the same is hereby made perpetual, and the defendant, its officers, agents and employes are

hereby enjoined and inhibited from refusing to accept from the complainant beer shippd by it and consigned to points on its line of railway in local option districts in the State of Kentucky, and from refusing to ship and deliver such beer to the consignees at such points.

## APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Afterward, on May 5, 1908, appellant filed its petition for an appeal and assignment of errors, which claim for appeal was then allowed by the judge of the Circuit Court. On the same day an appeal bond was duly executed and approved, and citation was thereupon issued and service thereof acepted by appellee's solicitor. (R. 24-28.)

## ASSIGNMENT OF ERRORS ON THE APPEAL TO THE CIRCUIT COURT OF APPEALS.

The appellant by its assignment of errors on the decree of the Circuit Court dated April 21, 1908, states that said court erred in the decree aforesaid to the prejudice of appellant in the following particulars (R. 25, 26):

I. In not decreeing the dissolution of the preliminary injunction and the dismissal of complainant's bill, because the Vanderburgh Circuit Court of the State of Indiana, wherein this action was originally instituted, had no jurisdiction of the subject matter therof.

II. In not decreeing the dissolution of the preliminary injunction and a dismissal of complainant's

action for want of equity in the bill, and because it is not shown thereby that complainant would suffer irreparable injury if the said injunction had not been granted, and complainant had an adequate remedy at law, if entitled to any remedy at all.

III. In not decreeing that the Vanderburgh Circuit Court of the State of Indiana was without jurisdiction of the subject matter of this action, because the Interstate Commerce Commission has original and exclusive jurisdiction thereof.

IV. In not decreeing that the order granting to complainant the preliminary injunction as prayed for in its bill is void, because it is a regulation of interstate commerce and affects property and rights of the parties beyond the territorial jurisdiction of the Vanderburgh Circuit Court or of the Circuit Court of the United States for the District of Indiana.

V. In not decreeing that the rule or regulation established by the defendant that it would not accept or transport spirituous, vinous, malt or other intoxicating liquors from any point on its lines for delivery at any point on its lines where the sale of such liquors is prohibited by law, and did not hold itself out as a common carrier of such liquors from any point to any such points, of which complainant and all others engaged in like business, as well as the public at large, had due and ample notice prior to the institution of this action, was a reasonable and lawful rule or regulation, and operated to exempt the defendant as a common carrier of such liquors from any point on its lines to all such points, and relieved defendant of any duty of carrying the same, including the beer offered by complainant to

the defendant at Evansville, Indiana, for shipment to destinations in local option districts and counties in Kentucky, where the sale of such liquors was and is prohibited by law, and the transportation to which points in Kentucky by defendant is prohibited by the laws of that State.

VI. In not decreeing that the statute of Kentucky, prohibiting the transportation of spirituous, vinous, malt, or other intoxicating liquors, and the delivery thereof at places where the sale of such liquors is made unlawful by law, is valid as to the defendant, a corporation chartered under the laws of that State, and deriving all its powers and authority therefrom.

VII. In ordering, adjudging and decreeing that the preliminary injunction or temporary restraining order granted by the Vanderburgh Circuit Court of Indiana be made perpetual, and in enjoining and inhibiting the defendant, its officers, agents and employes from refusing to accept from complainant beer shipped by it and consigned to points on the defendant's line of railway in local option districts in the State of Kentucky, and from refusing to ship and deliver such beer to the consignees at such points.

The appeal to the Circuit Court of Appeals was heard on February 9, 1909, in that court, which on April 13, 1909, affirmed the decree appealed from in pursuance of a written opinon delivered by Circuit Judge Baker. (R. 35-39.) This opinion will be found in 172 Fed. 117.

Afterward, on May 13, 1909, appellant filed its petition for an appeal to this court, its assignment of errors,

bond on appeal, which was approved, and an appeal granted and allowed by the court below, as prescribed by law, the citation issued being accepted by counsel of record for appellee May 18, 1909. (R. 40-46.)

## ASSIGNMENT OF ERRORS ON APPEAL TO THIS COURT.

And now on this 13th day of May, 1909, comes the appellant, the Louisville & Nashville Railroad Company, by Henry L. Stone, Philip W. Frey and George R. DeBruler, its counsel, and says that in the decree rendered by the United States Circuit Court of Appeals for the Seventh Circuit, in the above entitled cause, on April 13, 1909, and in the record and proceedings in said cause in said court, there is manifest error as set forth in this, its assignment of errors, which is presented and filed simultaneously with its petition for appeal, as follows:

I. The said Circuit Court of Appeals erred in not reversing the decree of the Circuit Court of the United States for the District of Indiana appealed from rendered April 21, 1908, in the suit in equity of The F. W. Cook Brewing Company, complainant, against the Louisville & Nashville Railroad Company, defendant, originally instituted in the Circuit Court of Vanderburgh County, in the State of Indiana, and thence removed to the said United States Circuit Court, because the latter court on final hearing erred in not dissolving the preliminary injunction and dismissing the said complainant's bill, on the ground that said Vanderburgh Circuit Court of

the State of Indiana had no jurisdiction of the subject-matter thereof.

II. The said Circuit Court of Appeals erred in not reversing the said decree of the United States Circuit Court, because it erred in not decreeing the dissolution of the preliminary injunction and a dismissal of said complainant's suit for want of equity in the bill, and it was not shown thereby that said complainant would suffer irreparable injury if the injunction were not granted, and when said complainant had an adequate remedy at law, if entitled to any remedy at all.

III. The said Circuit Court of Appeals erred in affirming the said decree of the said United States Circuit Court on the ground that the refusal of appellant to carry the beer of the appellee to certain destinations in the State of Kentucky was a question of common law, not involving an interpretation or application of any provision of the Interstate Commerce Act, and in not reversing the same on the ground that the Interstate Commerce Commission had original and exclusive jurisdiction of the subject-matter of the complaint, and that neither the said Vanderburgh Circuit Court nor the said United States Circuit Court had original jurisdiction thereof.

IV. The said Circuit Court of Appeals erred in upholding the jurisdiction of the State court and of the said Circuit Court by their orders and decrees to affect property and rights of appellant beyond the territorial reach of said courts, and further erred in not vacating or modifying the decree appealed from, in so far as it commanded and required appellant to transport and make deliveries of beer

to consignees at points in Kentucky where the sale thereof was and is prohibited by law.

V. The said Circuit Court of Appeals erred in not reversing the decree of said Circuit Court on the ground that the rule or regulation established by appellant that it would not accept for transportation or transport spirituous, vinous, malt or other intoxicating liquors from any point on its lines for delivery at any point on its lines, where the sale of such liquors is prohibited by law, and did not hold itself out as a common carrier of such liquors from any point to any such points, of which appellee and all others engaged in like business, as well as the public at large, had due and ample notice, prior to the institution of this suit, was a reasonable and lawful rule or regulation, and operated to exempt appellant as a common carrier of such liquors from any point on its lines to all such points, and relieved appellant of any duty of carrying the same, including the beer offered by appellee at Evansville, Indiana, for shipment to destinations in local option or prohibition districts and counties in the State of Kentucky, where the sale of such liquors was and is prohibited by law, and the transportation to which points by appellant is prohibited by the laws of that State.

VI. The said Circuit Court of Appeals erred in not reversing the decree appealed from on the ground that the Statute of the State of Kentucky, approved March 21, 1906, referred to in appellant's answer, and a copy of which is made Exhibit A therewith, which prohibits the transportation by a public or private carrier of spirituous, vinous, malt and other intoxicating liquors, and the delivery

thereof at places where the sale of such liquors is made unlawful by law, is valid as to appellant, a corporation incorporated and existing under the laws of that State, and deriving all its powers and authority therefrom.

VII. The said Circuit Court of Appeals erred in not sustaining each of the errors assigned on appellant's appeal from the decree of said circuit court, and in not reversing the said decree making perpetual the preliminary injunction or temporary restraining order granted by the Vanderburgh Circuit Court of the State of Indiana, and ordering, adjudging, and decreeing that appellant, its officers, agents, and employes be perpetually enjoined and inhibited from refusing to accept from appellee beer offered for shipment by appellant and consigned to points on appellant's lines in local option districts or prohibition territory in the State of Kentucky, and from refusing to ship and deliver such beer to the consignees at such points in that State.

## BRIEF OF ARGUMENT.

### I.

### THE VANDERBURGH CIRCUIT COURT OF INDIANA HAD NO JURISDICTION OF THE SUBJECT MATTER OF THIS ACTION.

1. Of the assigned errors, Nos. 1 and 3 will be considered and discussed together. They challenge the jurisdiction of the Vanderburgh Circuit Court of the State of Indiana over the subject-matter of this action, because original and exclusive jurisdiction thereof has been vested by the Act to Regulate Commerce in the Interstate Commerce Commission.

The bill and answer show the shipments of beer or intoxicating liquor, which appellant, its officers, agents and employes, were enjoined, by the restraining order of the Vanderburgh Circuit Court, from refusing to accept, ship from Evansville, Indiana, and deliver to consignees at local option points in Kentucky, are interstate shipments, and as such constitute interstate commerce, and are, therefore, regulated and to be governed by the provisions of the Act to regulate commerce and the amendments thereto. The court's attention is called to the following provisions of that Act:

Section 1, as amended June 29, 1906, declares what carriers shall be subject thereto, and defines the terms "common carrier" and "railroad" as used in the Act, as well as the term "transportation," which, it is declared, "shall include cars and other vehicles and all in-

strumentalities of shipment of carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor."

Section 3, which has an important bearing upon the questions involved herein, contains the following provision:

> That it shall be *unlawful* for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or *locality*, or *any particular description of traffic*, in any respect whatsoever, or *to subject* any particular person, company, firm, corporation, or *locality*, or *any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

This section is commonly known as the "discrimination section," and is the one which appellee must necessarily rely upon for relief from the discrimination, alleged by it to have been made by appellant against the "particular description of traffic" and the *localities*, referred to in its bill.

Section 13 provides that any person, corporation or association complaining of anything done or omitted to be

done by any common carrier subject to the Act in contravention of the provisions thereof, may apply to the Commission by petition, and prescribes the procedure to be followed for obtaining relief.

Section 15 of the Act, so far as it pertains to the powers of the Commission over the *regulations or practices* of carriers, provides:

> That the Commission is authorized and empowered, and it shall be its duty whenever, after full hearing upon a complaint made as provided in Section Thirteen of this Act, * * * it shall be of opinion * * * that any *regulations* or *practices* whatsoever of such carrier or carriers affecting such rates, are unjust, or unreasonable, or unjustly discriminatory or unduly preferential, or otherwise in violation of any of the provisions of this Act, to determine and prescribe * * * what *regulation* or *practice* in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, * * * and shall conform to the *regulation* or *practice* so prescribed. * * *
>
> The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act.

Section 16 prescribes the two methods of civil procedure for the enforcement of the orders of the Commission where the carrier fails or neglects to obey the

same; the first relating to orders for the payment of money alone, and the second to all orders other than for the payment of money.

The latter method is as follows:

> If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, while the same is in effect, any party injured thereby, or the Commission in its own name, *may apply to the circuit court in the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen, for an enforcement of such order.* Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it, or them, obedience to the same; and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus.

> From any action upon such petition an appeal shall lie by either party to the Supreme Court of the United States, and in such court the case shall have priority in hearing and determination over all other causes except criminal causes, but such appeal shall not vacate or suspend the order appealed from.

In addition to these methods of civil procedure, the same section imposes a forfeiture of $5,000 to the United States for each offense, where the carrier, or any of its officers or agents, *knowingly* fails or neglects to obey an order made under the provisions of Section 15, which, besides orders of the Commission pertaining to rates as above stated, covers those condemning any existing *regulation* or *practice* of the carrier as unjust, unreasonable or unjustly *discriminatory*, or unduly preferential, and determining and prescribing what *regulation* or *practice* in respect to interstate transportation is just, fair and reasonable to be thereafter followed.

Section 16 also provides, in behalf of the carrier, a judicial hearing upon the reasonableness or legality of any order or requirement of the Commission, and fixes the venue of suits brought for that purpose, as follows:

> *The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission, shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office,* and may be brought at any time

after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia, then the venue shall be in the district where said carrier has its principal office; and jurisdiction to hear and determine such suits is hereby vested in such courts.

In the same section the provisions of "An Act to expedite the hearing and determination of suits in equity, and so forth," approved February 11, 1903, are made applicable to all such suits, including the hearing on an application for a preliminary injunction, as well as to any proceeding in equity, to enforce any order or requirement of the Commission, or any of the provisions of the Act to regulate commerce, and all acts amendatory thereof or supplemental thereto.

Furthermore, it is made the duty of the Attorney General in every such case to file the certificate provided in said expediting Act, and upon appeal as therein authorized to the Supreme Court of the United States, the case shall have in such court priority in hearing and determination over all other causes except criminal causes. Then follow these provisions:

> *Provided*, That no injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the Commission shall be granted except on hearing after not less than five days' notice to the Commission. An appeal may be taken from

any interlocutory order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States: *Provided, further,* That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court over all other causes, except causes of like character and criminal causes.

By Section 23, added by the Act of March 2, 1889, the *Federal courts* are vested with further powers and jurisdiction, covering the subject-matter of appellee's complaint, as follows:

> *That the circuit and district courts of the United States* shall have jurisdiction upon the relations of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the Act to which this is a supplement and all Acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or *upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper,* to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: *Provided,* That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question

of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: *Provided*, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies *provided by this Act or the Act to which it is a supplement.*

With all this elaborate machinery provided by the Congress of the United States in its wisdom for the regulation of interstate commerce and the redress of all grievances complained of by shippers against common carriers subject to said Act, growing out of or pertaining to the transportation of such commerce, it is clear that it was intended to be *exclusive* of all other remedies for alleged wrongful or unlawful acts or omissions on the part of such carriers. There is nothing left with respect to interstate matters covered by said Act *within the jurisdiction of the State courts.*

From a careful reading of the foregoing provisions in the Act to regulate commerce, the conclusion is inevitable that the remedies, civil and criminal, therein prescribed, were intended to embrace all causes of action arising out of or pertaining to the transportation of interstate commerce, and that such remedies must be pursued as therein prescribed and in no other manner or before any other tribunal. Appellant should have gone first before the Interstate Commerce Commission to obtain an appropriate order against appellee, if "any *locality* or any particular description of traffic" (its

beer, for instance) was subjected by appellant to any "undue or unreasonable prejudice or disadvantage in any respect whatever," as provided in Section 3, *supra,* on account of appellant's refusal to accept, ship and deliver the same to appellee's customers to points within local option districts in Kentucky; and, second, if such order was granted, appellee, "being the party injured thereby," should have then applied (or had "the Commission in its own name" to apply) "to the circuit court (of the United States) in the district where such carrier (appellant) has its principal operating office, or in which the violation or disobedience of such order shall happen for an enforcement of such order * * * by writ of injunction or other process, mandatory or otherwise," as provided in Section 16, *supra.*

If this civil remedy proved to be insufficient to bring full and expeditious relief, appellee could have asked the Attorney General to direct the District Attorney for the district of Indiana to institute civil suits to recover of appellant the forfeiture of $5,000 for each offense, in *knowingly* failing or neglecting to obey such order of the Commission, as provided in the same section, or could have invoked the aid of a Federal grand jury to indict appellant, or its officers or agents, for the misdemeanor committed in *willingly* suffering or permitting to be done an act prohibited or declared to be unlawful, as provided in Section 10 of the Act. But, it may be contended by appellee's counsel, that there is a saving clause in Section 22 of the original Act to regulate com-

merce which prevents it from being *exclusive* in this respect. That clause is as follows:

> Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

It was insisted by appellee's learned counsel that the bill in equity for an injunction instituted in the State court was maintainable "at common law"; and the court below, as we shall undertake to show, erroneously so held, using this language (R. 37-38; 172 Fed. 118-119):

> The contention that appellee's remedy, if any, was limited to proceedings before the Interstate Commerce Commission we deem untenable. No complaint was made that the beer rates were unreasonable, either in themselves or on comparison with rates for other commodities, or that appellee was subjected to any undue disadvantage in its competition with other brewers, or that Evansville was discriminated against. Any such complaint would go to the Commission. But the suit here was based on appellant's refusal to carry under any circumstances goods of a class for which appellant had made generally a classification and rate. Whether the refusal to carry the property in question, like a refusal to carry some person, was justified or not, we believe is a question of common law, not an interpretation and application of any provision of the Interstate Commerce Act (Act February 4, 1887, c. 104, 24 Stat. 379, U. S. Comp. St. 1901, p. 3154). And the Act itself provided that nothing therein

should in any way abridge the remedies at common law. See Danciger v. Wells, Fargo & Co. (C. C.), 154 Fed. 379.

It will be observed the remedies referred to in the Act, which are not abridged or altered, are *common law* or *statutory* remedies existing at the passage of said Act, February 4, 1887. It will not be contended by appellee's counsel that the remedy he sought for his client by the complaint filed in the *State court* is a *statutory* remedy.

In *Central Stock Yards* v. *Louisville & Nashville Railroad Company,* 112 Fed. 823, the Circuit Court of the United States for the Western District of Kentucky held that the remedies provided by the Act to Regulate Commerce are exclusive, and that a bill for a mandatory injunction to compel obedience to the provisions of Section 3 of said Act would not lie.

In *Texas & Pacific R'y Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, this court in a thoroughly considered opinion by Mr. Justice White, to which there was no dissent, held that a shipper can not sue at law in a State court to recover an alleged overcharge or charge above what was alleged to be a reasonable rate on an interstate shipment of freight, where the rate charged and collected by the carrier is that published and filed with the Interstate Commerce Commission as required by the Act to Regulate Commerce, before having obtained an order from that Commission condemning the rate charged and collected as unjust or unreasonable, and awarding the amount of

damages he is entitled to. The same rule it seems to us applies with equal force to the same kind of a suit at law in a Federal court by a shipper who had not taken the necessary preliminary steps successfully before the Commission. This point has been expressly decided in a suit at law for damages instituted in the Circuit Court of the United States for the District of West Virginia. (*Howard Supply Co.* v. *Chesapeake & Ohio R'y Co.*, 162 Fed. 188.)

Nor, under the logic of the opinion in the *Abilene Cotton Oil Company* case, can a shipper, without having successfully taken such preliminary steps before the Commission, be allowed to go into a court of equity, State or Federal, and obtain relief by injunction, mandatory or preventive, against an alleged unjust or unreasonable interstate freight rate, or on account of an alleged unjust, unreasonable or unjustly *discriminatory regulation* or *practice* of a carrier in the transportation of interstate traffic.

Such a rate, or such a regulation or practice, must be first complained of before, and, after full hearing, passed upon by, the Interstate Commerce Commission, and if that body condemns it as unjust, unreasonable, or unjustly discriminatory, then, for the first time, can the shipper or complaining party go into the courts, either by an action at law to recover the damages that may have been awarded him by the Commission, or by an action in equity for the enforcement of the Commission's order by writ of injunction, mandamus or other process. Even after action by the Commission favor-

able to the complaining party, the latter must seek the enforcement of the Commission's order in the premises by an appropriate suit in the *Federal* court having jurisdiction, as prescribed in the provisions of the Act to Regulate Commerce, above referred to, and not in a *State* court.

In *Baltimore & Ohio R. R. Co.* v. *United States, ex rel. Pitcairn Coal Co.,* 215 U. S. 481, it was held by this court that the grievances produced by regulations adopted by a railway company for the distribution of coal cars in times of car shortage to the bituminous coal mines served by it, which were alleged to violate the provisions of the Act to Regulate Commerce, prohibiting unjust preferences or undue discriminations, can not be redressed, even in a Circuit Court of the United States, let alone a State court, in advance of the action of the Interstate Commerce Commission, by mandamus to prohibit the acts complained of and to prescribe a rule or regulation for the future, since the provisions of the Act of March 2, 1889, added to and constituting Section 23 of the Act to Regulate Commerce.

In the course of the opinion in that case the Act, as amended in 1889 and 1906, applicable to cases of alleged preferences and discriminations by a carrier's regulations or practices, was construed as follows (Ib. 498-500):

> As it was settled in the Abilene case that the right to question in the courts the rates established in accordance with the Act to Regulate Commerce without previous resort, by complaint, to the Com-

mission, in order to determine their unreasonableness, would be destructive of the Act, and therefore was not permissible, that ruling is equally applicable to the provision as to furnishing cars, contained in Section 10, which is here relied upon. But as we are required, for the determination of the case now before us, to consider the scope of the Act to Regulate Commerce as now existing, as a result of the amendments of 1906, we shall not rest our conclusion alone upon the persuasive force of the reasoning which constrained to the conclusion announced in the Abilene case. Speaking generally, it is true to say that, prior to 1889, although the prohibitions of the Act to Regulate Commerce as to *preferences* and *discriminations* were far-reaching, the mechanism provided by the statute for the enforcement of orders of the Commission on the subject, as well as those concerning a finding as to unreasonable rates, were deemed to be in many respects ineffective, or at least tardy in operation or unsatisfactory in prompt remedial results, and this because immediate effect was not given to the orders of the Commission, but the aid of judicial authority was required as a prerequisite for such result. Section 10, here relied upon, was not part of the original Act, but, as we have said, was added thereto on March 2, 1889, for the obvious purpose of making the remedial processes of the Act more speedy and efficacious. Now, it can not in reason be questioned that among the purposes contemplated by the amendments adopted in 1906 was the curing of the presumed remedial inefficiency of the Act by supplying efficient means for giving effect to the orders of the Commission, made in the exertion of the authority

conferred upon that body. To that end, one of the amendments, Section 4, gives operative effect to the orders of the Commission without the sanction of previous judicial authority, and endows that body with the power, not only as to unreasonable rates, but as to *practices* found upon complaint to be *unduly prejudicial* and *unjustly discriminatory,* to correct the same by its order, which order should have effect within the period fixed in the statute, and, to enforce these provisions, penalties and forfeitures are provided. Section 5. It being demonstrable, as we have seen, that to give to Section 10 the broad meaning which the court below fixed to it would be to destroy or render inefficacious the remedial purposes of the amendments enacted in 1906, it must follow that such construction can not be adopted, since to do so would compel us to hold that the wide and far-reaching remedies created by the amendments of 1906 were, in effect, destroyed by the narrower remedial processes which had been previously enacted in 1889. This conclusion being in reason impossible, it must follow that, construing the provisions of Section 10 in the light of and in harmony with the amendments adopted in 1906, the remedy afforded by that section, in the cases which it embraces, must be limited either to the performance of duties which are so plain and so independent of previous administrative action of the Commission as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to orders of the Commission, rendered within the lawful scope

of its authority, until such orders are set aside by the Commission or enjoined by the courts.

The decree of the court below was rendered herein before the controlling decision of this court in the case last cited.

In the case of *Danciger* v. *Wells, Fargo & Co.*, 154 Fed. 379, 381-3, decided July 5, 1907, by District Judge Pollock for the Circuit Court of the United States for the Western District of Missouri, cited by the court below to sustain the jurisdiction of the State court herein, an application of wholesale liquor dealers of Kansas City, Missouri, was made for a mandatory injunction and refused against certain express companies to compel them to accept, transport, and deliver C. O. D. shipments of intoxicating liquors, and to collect from the consignees in other States the purchase-price of such liquors. The court, however, held, in that case (erroneously, as we maintain), that such suit to compel an interstate carrier to receive and transport goods tendered to it for shipment, which it wholly refused to do, is one to compel the performance of a duty imposed on it by *general law*, and within the jurisdiction of the courts; and that complainant was not required to resort, in the first instance, to the Interstate Commerce Commission. The reasoning of the court on that point is very meagre and not well sustained, being without the benefit of the reasoning employed in the decision of this court in the Pitcairn case subsequently decided.

2. By No. 4 in its assignment of errors appellant insists that the court below erred in not decreeing that the

order of the State court granting to appellee the preliminary injunction was void, as well as the order of the Circuit Court perpetuating the same, because they affected property and rights of the parties beyond the territorial jurisdiction of either court.

Our contention is that the order granting the preliminary injunction is void, because the State court thereby undertook to affect property and rights of the parties beyond its territorial jurisdiction, or that of the Circuit Court. The State court had no power or authority to grant a mandatory injunction requiring appellant, its officers, agents and employes, to perform acts in Kentucky affecting property in that State.

In 11 Cyc. 684, this principle is laid down:

> Generally the right of a court to issue injunction is only co-extensive with the limits of its territorial jurisdiction, and the same principles and the exceptions to the rule which govern the scope and extent of jurisdiction over extra-territorial property control and prevent the issuance of injunctions relating to property in another State.

The case of *Western Union Telegraph Co.* v. *Western & Atlantic Railroad Co.*, 8 Baxter (Tenn.) 54, is in point. The complainant telegraph company in that case sought to have the defendant railroad company and its agents enjoined from connecting any wire with the line belonging to the complainant running from Chattanooga, Tennessee, to Atlanta, Georgia, or from using the same in any way for the transmission of messages, or from molesting or interfering with the free enjoyment by com-

plainant of its said telegraph line. The court in refusing the injunctive relief sought, said:

> While it has been settled ever since the leading case of *Penn* v. *Lord Baltimore,* 1 Vesey, 444, that a court of equity will take jurisdiction to enforce a *contract* respecting lands, even, notwithstanding the lands lie beyond its jurisdiction, when it has jurisdiction of the parties, and can act in *personam* in the enforcement of its decree (See *Penn* v. *Lord Baltimore,* 3 Col. & C. in Eq., and notes, 477, *et seq*), yet we think it an equally sound qualification of the rule, that equity will not take jurisdiction when full and complete relief can not be granted and enforced, except by the exercise of authority over property which lies within another State. See *Lead, Cases in Eq.* 497, 498. In other words, it will not make a decree that it can not enforce by its own authority, and which would be mere words, having no sanction by way of making them effective. It is evident in this case that a decree against the officers and agents of the corporation in the State of Georgia might be disregarded every day, and a court of chancery in Tennessee would be powerless to punish for the contempt of its authority. It will not, therefore, make such a decree.

The order granting the preliminary injunction in the case at bar (R. 7-8), which is perpetuated by the decree appealed from (R. 24), discloses the fact that the appellant, its officers, agents and employes, are enjoined and inhibited from refusing to accept from appellee such shipments of beer as may be offered by appellee and con-

signed to points on appellant's line in local option districts in Kentucky, and from refusing to ship and deliver such beer to the consignees at such points. In other words, appellant is practically by mandatory injunction enjoined to accept, ship and deliver shipments of beer from Evansville, Indiana, to all local option points on its lines in Kentucky; that is to say, the Indiana court undertakes to require and compel appellant, its officers, agents and employes, to receive the shipment of beer in that State, transport it across the Ohio River into Kentucky, and thence to the point of final destination, and, after having transported the same to that point, then to deliver such shipment of intoxicating liquor to the consignee. We submit that such an order or decree was beyond the power and jurisdiction of either the State court or the Circuit Court to make or enforce.

## II.

## AFTER REMOVAL IT WAS THE DUTY OF THE COURT BELOW TO DISSOLVE THE TEMPORARY RESTRAINING ORDER AND DISMISS THE ACTION.

Wherever there is a total absence of jurisdiction over the subject-matter in the State court, so that it had no power to entertain the suit in which the controversy was sought to be litigated in its then existing or any other form, there can be no jurisdiction in the Federal court to entertain it on removal, although in some other form it would have plenary jurisdiction over the case made between the

parties. (*Fidelity Trust Co.* v. *Gill Car Co.*, 25 Fed. 737; *Foster's Federal Practice*, Sec. 391, pp. 955-6, and authorities cited in note 22.)

In such case it has been held that the suit should be dismissed and not remanded by the Federal court, although it might have taken original jurisdiction of the same. (*Auracher* v. *Omaha & St. L. R. Co.*, 102 Fed. 1.)

In *Swift* v. *Philadelphia & Reading R. Co.*, 58 Fed. 858, the Circuit Court of the United States for the Northern District of Illinois, in an opinion delivered by District Judge Grosscup, November 27, 1893, it was held, as the syllabus shows:

> 1. The common law rule forbidding common carriers from exacting unreasonable charges does not apply to interstate commerce, even when the contract of carriage is made in a State where that rule prevails, since such commerce is governed solely by the laws of the United States, and United States have never adopted the common law.
>
> 2. Federal courts have no jurisdiction in suits removed from State courts, on the ground of diverse citizenship, to enforce the provisions of the Interstate Commerce Act, since in removed cases the jurisdiction of the Federal courts is no wider than that of the courts in which the cases were begun.

In the course of his opinion in that case Judge Grosscup said (Ib. 859):

> Outside of the Interstate Commerce Act, there is no enactment of Congress, and no self-operating provision of the Federal Constitution, which ex-

> pressly or by implication evidences a command or purpose to interfere with the freedom of Interstate Commerce, or lay any restraint upon the rights of carriers or shippers engaged therein. *Welton* v. *State of Missouri*, 91 U. S. 282; *Brown* v. *Houston*, 114 U. S. 622, 5 Sup. Ct. 1091.

Further on, with respect to removed cases, he stated (Ib. 861):

> The removal simply transfers the hearing from the State to the national tribunal, but does not enlarge the right of the court to hear the cause. The right to question the reasonableness of an interstate commerce rate is a matter of primary, as well as of exclusive, jurisdiction in the Federal courts. It does not reside in the jurisdiction of the State courts, or of the Federal courts, acquired by the fact of diverse citizenship.

In *Sheldon, et al.* v. *Wabash R. Co., et al.*, 105 Fed. 785, decided by the Circuit Court for the Northern District of Illinois (District Judge Kohlsaat rendering the opinion), the suit was brought in the State court and removed to the Federal court. The complainants sought a mandatory injunction compelling defendants to cease the enforcement of certain alleged unjust discriminations against complainants in the matter of freight rates on carload shipments between New York and Chicago. The sole question presented on the argument of the demurrers was that of the jurisdiction of the State court to entertain the proceeding. Among others the following propositions of

law were held to be sustained by the authorities, and were controlling in the decision of that question (p. 786):

> That there is not now, and never has been, any jurisdiction at common law over commerce between the States.
>
> That the Interstate Commerce Act creates rights and remedies not existing at common law, and constitutes legislation solely within the power of the Federal Government.
>
> That the jurisdiction of the Federal courts over causes arising under the Interstate Commerce Act is exclusive, and no action can be maintained in the State courts thereon.
>
> That the question of lack of jurisdiction presented here is always open for determination, even though there may be in the case prior rulings of the same or another judge sustaining the jurisdiction.
>
> The bill will therefore be dismissed for want of jurisdiction in the State court to entertain it.

A party on whose petition a cause is removed into the Federal court is estopped to deny the jurisdiction of such court to render judgment against him therein *unless* on the ground that the State court was without jurisdiction. (*Cowley* v. *Northern Pac. R. Co.*, 159 U. S. 569; *Mastin* v. *Chicago, R. I. & P. R'y Co.*, 123 Fed. 827.)

There can be no question that the petition of appellant presented proper grounds for removal. (R. 9-11.) Diversity of citizenship and the jurisdictional amount were shown thereby, as well as a case arising under the Constitution and laws of the United States, especially the Act to Regulate Commerce.

Under Section 6 of the Judiciary Act of March 3, 1891 (26 Stat. at L. 826), appellant was entitled to an appeal from the decree of the court below to this court as a matter of right, as the right to removal from the State Court was not based merely upon the diverse citizenship of the opposite parties to this suit, but also upon the ground that this case arises under the Constitution and laws of the United States, which fact appears from the appellee's statement of its case in the State Court, as well as in appellant's petition for removal, and the matter in controversy as averred in appellant's said petition exceeds $1,000 besides costs.

## III.

## EVEN IF THE STATE COURT HAD JURISDICTION THERE WAS NO EQUITY IN THE BILL.

Error No. 2, assigned by appellant, raises this question. The only ground of jurisdiction in equity alleged in the bill is that appellee will sustain irreparable injury and loss in its business and established trade, if the granting of a temporary restraining order be delayed until final hearing and that appellant's lines are the only means by which appellee can deliver beer to its customers at the places stated in its complaint.

Now, what sort of trade had appellee established in Kentucky? In its complaint appellee alleges that it has built and established an extensive and valuable trade in beer in the State of Kentucky, and has secured in the cities and towns thereof, and elsewhere in said State,

many customers who depend on it to furnish them with beer, and on whose continued trade the success of its business, to a considerable extent, depends. Six instances are cited in appellee's complaint where appellant is alleged to have refused to make shipments of beer for appellee to points in Kentucky. These points were Elkton, Allensville and Mannington. (R. 2-3.) The complaint admits these proposed shipments to all of said points "are in counties or districts of the State of Kentucky known as local option districts, in which under the laws of the State of Kentucky the sale of intoxicating liquors is prohibited." (R. 4.)

Furthermore, to avoid this legal obstacle in its way, appellee makes the following averment. (R. 4.):

> That at said dates (in March, 1907), the persons to whom the plaintiff had sold said beer and to whom the same was consigned had *unexpired licenses* for the sale of intoxicating liquors in the respective counties in which said places were situate, and it was and is lawful for such persons to sell intoxicating liquors in said respective counties until the expiration of their respective licenses.

Appellant in its answer specifically denied this averment of the complaint, and alleged "that if the shipments so tendered were consigned to any such persons having at the time unexpired licenses, said licenses have long since expired, and there are no persons in said prohibition districts or counties engaged in the sale of intoxicating

liquors under licenses which have not yet expired." (R. 15.)

Appellee having filed no replication, this averment stands confessed.

When a case is set down for hearing on bill and answer, all the facts well pleaded in the answer are taken as true, whether responsive to the bill or not. (*People's U. S. Bank* v. *Gilson,* 161 Fed. 286; *Perkins* v. *Nichols,* 11 Allen (Mass.) 542; *American Carpet Lining Co.* v. *Chipman,* 146 Mass. 385; *Banks* v. *Manchester,* 128 U. S. 244.)

*It is nowhere averred in the bill that appellee was without adequate remedy at law.* Indeed, it is clear from what is alleged in its bill that it had a complete remedy at law for the recovery of the damages, if any, it had already sustained by appellant's refusal to ship and deliver the six shipments of beer offered by it for shipment by appellant, consigned to persons at the three local option points in Kentucky, whose licenses to sell intoxicating liquors had expired, taking appellant's answer as true. It is not alleged by appellee that it had any other kind of customers in Kentucky besides those who were engaged in the sale of such liquors *under licenses so to do.* Whether or not it would be able to sell its beer in any quantity to those having no license to sell to others in local option or prohibition territory in Kentucky, during the pendency of its suit against appellant or thereafter, was speculative and so uncertain as not to call for the exercise of equitable jurisdiction by a *mandatory* injunction. The bill shows conclusively on its face a want of

equity, and that no great or irreparable loss or injury would have resulted to appellee had not the injunction been granted.

## IV.

## THE RULE OF THE APPELLANT THAT IT WILL NOT ACCEPT, TRANSPORT OR DELIVER INTOXICATING LIQUORS CONSIGNED TO POINTS IN KENTUCKY, WHERE THE SALE OF SUCH LIQUOR IS PROHIBITED BY LAW, IS REASONABLE AND VALID.

Of the other assigned errors, No. 6 will not be insisted on, but Nos. 5 and 7 will be discussed under this head, as they are based upon the reasonableness of the rule promulgated by appellant, after the passage of the Act of the Kentucky Legislature, approved March 21, 1906.

At common law a common carrier was only required to transport those commodities which it held itself out ready and willing to carry, and he might be a common carrier, and, at the same time, a private carrier; or a carrier for all who offered, as to certain things and between certain points, and a private carrier as to other things between other points; and he was only bound to carry the things which he was in the habit of carrying and which were within his profession as a common carrier.

In the case of *Dickson* v. *G. N. R'y Co.*, 5 Eng. Rul. Cas. 358, the court, in discussing the duty of carriers before the passage of the English Railway and Traffic Act of 1854, said:

> The duty of railway companies to carry any particular class of goods depended upon whether they did or did not profess to carry such goods as common carriers. The Railway Clauses Consolidation Act, 1845, did not impose on railway companies any duty to carry goods of which they were not common carriers by reason of their own conduct and profession.
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> * * * * * * * * * * * * * * *
>
> Whether railway companies are common carriers of particular classes of goods depends upon what they habitually do or profess to do with respect to such goods.

Assuming the Act of March 21, 1906, prohibiting the shipment of liquor into local option districts, to be invalid as to interstate shipments, can a common carrier which has adopted a rule or regulation to conform to the law as written, be required by mandatory injunction to accept liquor offered for shipment from a point outside of Kentucky for local option points within that State?

In 5 *A. & E. Ency. of Law* (2 *Ed.*) *page* 162, we find:

> The duty to accept for carriage and to carry goods tendered is not an *absolute* duty on the part of a carrier, but is subject to reasonable limitations and conditions. A carrier is not a common carrier as to every character of goods, but only as to such as he professes to carry; he may, therefore, refuse to accept for transportation goods of a character which it is not his business or custom to carry, and which he does not hold himself out as willing or undertaking to carry. (*Johnson* v. *Midland R. Co.*, 4 Exch. 367; *Oxlade* v. *N. E. R. R. Co.*, 15 C. B. N. S. 680;

*Pfister* v. *Central Pacific R. R. Co.*, 70 Cal. 169; *Penn. Co.* v. *K. Bridge Co.*, 170 Ill. 645; *Wilson v. Atlantic Coast Line R'y*, 129 Fed. 774; *Milwaukee Malt Extract Co.* v. *Chicago, etc., R. R. Co.*, 73 Ia. 98.) And he may profess to carry a certain character of goods only, and in a certain way, and may refuse to carry them under any other conditions. (*Lake Shore, etc., R. R. Co.* v. *Perkins*, 25 Mich. 329; *Harp* v. *Choctaw, etc., R. R. Co.*, 125 Fed. 445.)

In *Elliott on Railroads*, Vol. 4, Sec. 1465, the author declares:

> By virtue of the character of railroad companies as common carriers of goods they are under a general duty to receive and carry, when properly offered, all goods of the kind they undertake or assume to transport. But, as we have already said, and as will be hereafter shown, the duty to carry is not always an absolute one, for there may be conditions and circumstances which will excuse the carrier from receiving goods for transportation.

Again in Section 1466, he states:

> The general rule that a railroad company is under a duty to carry goods properly offered for transportation is, as we have indicated, subject, among other limitations and qualifications, to the limitation that its obligation extends only to the kind of goods the company undertakes to carry. In other words, railroad companies are common carriers only as to those goods which are of the kind usually or professedly carried.

In *Moore on Carriers*, Sec. 5, p. 98, the author declares:

> A common carrier of goods is not under obligation to accept and carry all personal property that may be offered to it. Its duty is limited to accepting and carrying property of such kinds, *to and from such places*, as it publicly professes and undertakes, or is accustomed, to carry, and has the facilities for so doing. * * * The carrier may determine by public announcement or confession the kind of goods it will carry, the conveyances to be used and the manner and time for transportation, the conditions fixed being such as are just and reasonable, and *treating all alike*. (Citing *Oxlade* v. *N. E. R. Co.*, 87 E. C. L. 454; *Bouker* v. *L. I. R. R. Co.*, 89 Hun. 202, 35 N. Y. Supp. 23, 25.) * * * It may legally refuse to receive goods, *if it does not carry to the place to which the shipper wishes to ship the goods* (citing *Pitlock* v. *Wells, Fargo & Co.*, 109 Mass. 452), * * * if they are improperly or defectively packed, insufficiently secured or addressed, in a damaged state, or otherwise not properly prepared for shipment, or in any unfit condition for carriage, or in a condition necessarily involving extra care and risk in their shipment. (Citing divers authorities.) It may lawfully refuse to receive or carry goods of an explosive or dangerous character, such as dynamite, nitroglycerine, vitriol, etc. (citing sundry authorities) or goods which the law prohibits it from carrying, such as intoxicating liquors. (Citing *State* v. *Goss*, 59 Vt. 266, 30 A. & E. R. Cas. 118; *Milwaukee, etc.* v. *Chicago, etc., Co.*, 73 Iowa, 98.)

In 1 *Hutchison on Carriers,* Sec. 144, it is said:

> And even when from public notoriety or from the evidence which may be adduced, the presumption arises that the carrier has unlawfully refused to accept or to carry the goods, it is still competent for him to show that, although the goods are of the kind which carriers like himself are usually bound to carry, *he has exonerated himself from the obligation to do so by public notice or by his previous conduct in his business.*

And again in Sec. 145 the same author says:

> So he may show other reasons for his refusal which will legally excuse him. He may, for instance, lawfully refuse to receive them if they are improperly packed, or if they are otherwise in an unfit condition for carriage. Or he may show that the goods offered were of a dangerous character, which might subject him or his vehicle, or strangers or his passengers, or his other freight, to the risk of injury. And he may even refuse packages offered to him without being made acquainted with their contents, when there is good ground for believing that they are of a dangerous character. But he would have no right, unless from the appearance of the package or from other circumstances, his suspicions are reasonably aroused as to its contents, to require the owner who offered it for carriage to disclose their nature. But when such is the case, it would not only be his right, but his duty, to ascertain the truth, and if they proved to be of such a dangerous character, to refuse them.

In Sec. 147 it is said:

> So it will be a good excuse for refusing them if at the particular time when they are offered the way is exposed to extraordinary danger, or if the goods are of such a character that they would be exposed to the fury of a mob or to destruction by any kind of popular outbreak; for while the destruction or loss of the goods from any of these causes would be no defense against the liability of the common carrier, *the law will not require him against his will to expose himself to the risk.*

In *Harp* v. *Choctaw, etc., R. Co.*, 118 Fed. 169, which was subsequently affirmed by the Circuit Court of Appeals of the Eighth Circuit (125 Fed. 445), District Judge Rogers held that the action of a railroad company in furnishing cars to be loaded by wagon on its track at a station with coal for shipment in one direction to points within the State, while it refused to furnish cars to be so loaded for interstate shipments in the opposite direction, was not an unlawful discrimination against a shipper, where the order applied to all persons alike. Judge Rogers said (pp. 174-5):

> It is not intended to be said that duties and obligations can not be imposed by statutes on corporations. They owe their existence to the State, and the State may impose by their charters such terms as it sees fit, or deny charters altogether. It is only meant to say that where, by the charter, no such duties or obligations are imposed, *railroads may determine for themselves* what business they will engage in, what

means and methods of transportation they will employ, what goods they will carry, and between what points and under what circumstances they will receive them, subject always to the principles of the common law already announced, so far as applicable to the point in hand, and also within proper limits to the police power of the State, from which power the State can not part, and may exercise at its will, within constitutional limitations. Of course, the general rules stated are rules to be kept within the bounds of good faith and fair and reasonable conduct on the part of common carriers. They may not arbitrarily, whimsically, or capriciously, and without reasonable grounds, deny transportation simply because they have it in their power to do so; neither could they under like circumstances, make changes not in good faith as to what they will carry, where they will carry it to, or the means and methods to be employed; but to hold that, within the principles stated, they can not enlarge or curtail the class or kinds of articles they could carry, or determine the means and methods to be employed or to be held out to the public, would be, *in the absence of statutory regulation, to take from the carrier the conduct of its own business, and subject it to its customers.* It must not be forgotten that the principles just stated are subject, always, to this principle: *That what it does for one it must do for all under like circumstances.* Naturally all its interests will induce it to do all the business it can safely do, of all kinds, which afford it a just remuneration, *so that its selfishness is at last the greatest security the customer has for getting his business done.*

In *Interstate Commerce Commission* v. *Cincinnati, etc., R. Co.*, 167 U. S. 479, this court quoted approvingly the language of Justice Jackson, when circuit judge, in *Interstate Commerce Commission v. Baltimore & Ohio R. Co.*, 43 Fed. 37 (affirmed in 145 U. S. 263), as follows (493):

> Subject to the two leading prohibitions, that their charges shall not be unjust or unreasonable, and that they shall *not unjustly discriminate*, so as to give undue preference or advantage or subject to undue prejudice or disadvantage persons or *traffic* similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits.

In *Kansas Pacific R. R. Co.* v. *Nichols*, 9 Kans. 243, Judge Valentine said:

> At common law no person was a common carrier of any article *unless he chose to be*, and unless he held himself out as such; and he was a common carrier of just such articles as he chose to be and of no others. If he held himself out as a common carrier of silks and laces the common law would not compel him to be a carrier of agricultural implements, such as plows and harrows, and if he held himself out as a common carrier of confectionery and spices the com-

mon law would not compel him to be a common carrier of bacon, lard and molasses. (Citing *Tunnel* v. *Pettijohn*, 2 Harr. (Del.) 48; *Wiggins Ferry Co.* v. *E. St. Louis R. R. Co.*, 107 Ill. 451; *Thompson & Houston Electric Co.* v. *Simon*, 20 Ore. 60.)

In *Johnson* v. *Midland R'y*, 4 Exch. 367, the court said:

> A person may profess to carry a particular description of goods only, for instance, cattle or dry goods, in which case he should not be compelled to carry any other kind of goods; or he may limit his obligation to carry from one place to another, as from Manchester to London, and then he would not be bound to carry to or from intermediate places; still, *until he retracts*, every individual has a right to call upon him to receive and carry goods according to his public profession.

In every case, therefore, the question is whether the rule or regulation by which the carrier seeks to restrict its business is a *reasonable* one. The carrier can not arbitrarily refuse to carry a certain kind of goods which it has every facility to carry, and the carriage of which will not endanger its property, or the lives, property, health or morals of others; but can it be said that it is *unreasonable* for a carrier to adopt a rule that it will not ship liquor into districts in which the *sale of liquor is prohibited by State law*, and into which the Legislature has declared that it shall be unlawful to ship liquor, although the statute prohibiting the shipment is invalid as to interstate shipments?

Of course, the courts would never permit the carrier to hide behind a void statute, by making the existence of such a statute a mere excuse for discriminating against a particular commodity, individual or community, but where the carrier is seeking *in perfect good faith* to obey the mandate of the legislature, even though it has exceeded its power in attempting to regulate interstate commerce, the courts will be slow to say that the carrier has no right to do so. There can be no doubt as to the validity of the statute prohibiting the *sale* of liquor, whether the liquor has been brought from another State and is still in the original packages in which it was delivered, or has never been outside the State, and it is also clear that the enforcement of such statute is difficult, if not impracticable, unless the shipment of liquor into the prohibition territory is prohibited, the statute prohibiting the carrying of liquor into such territory being intended merely to aid the enforcement of the local option law. The statute prohibiting the shipment is *unquestionably valid as to intrastate commerce,* although it may be void as to interstate commerce, and if the carrier has no legal right to refuse to receive, transport and deliver shipments originating *outside* the State, then the carrier is compelled *to discriminate* against the *resident* shipper in favor of the *non-resident* shipper, when both State and Federal laws prohibit unjust discriminations. (Secs. 817, 818, Ky. Stats. Carroll's Ed. 1909; Sec. 3, Act to Regulate Commerce.) It is well settled, as we have seen, that carriers have some discretion, upon giving due notice, as to what they will carry, provided *all persons are*

*treated alike,* without discrimination, and any regulation relating to the conduct of their business which does not violate any statute, and which is *reasonable,* will be upheld by the courts. That being true, it seems that a regulation which is in aid of the enforcement of the State law must be held to be reasonable. It may be said that to uphold such a regulation is to give the carrier greater power than the Legislature has, but there are many things which the carrier may *voluntarily* do which the Legislature can not *require* it to do. The Legislature can not require the carrier to separate *interstate* passengers from *intrastate* passengers, but the carrier may make the separation if it elects to do so. (*Hall* v. *Decuir,* 95 U. S. 485.) The fact that a certain class of goods might be seized by a mob furnishes a sufficient reason for the carrier's refusal to carry them, as the carrier would be responsible for the loss of the goods, and can not be required to take that risk. For the same reason the carrier ought not to be required to take the *risk of litigation and penalties.* Under the statutes we are considering the carrier must, in order to be sure that it will escape the penalty, know that the goods have been ordered by some person in the State to which they are to be shipped, and if what purports to be an order is presented to the carrier, it takes some risk, unless it knows that the order is genuine. (*American Express Co.* v. *Commonwealth,* 30 Ky. Law Rep. 207.) Again, if a Kentucky manufacturer should take liquor across the Ohio River and there offer it for shipment into Kentucky, if accepted, it would not be interstate commerce,

and the carrier would be violating the law (*Crigler, etc.,* v. *Commonwealth,* 27 Ky. Law Rep. 921; 87 S. W. 276), and yet it would be difficult for the carrier to know whether or not the liquor had been originally brought from Kentucky. These risks are so great as to justify the carrier in making a regulation, upon due notice, that it will not carry intoxicating liquors at all into any local option district, and that it will treat all shippers, both resident and non-resident, alike.

The ground upon which prohibitory liquor laws are upheld is that liquor is not only injurious to the health and morals of the people, but that when used to excess it endangers life and property, and the Legislature of Kentucky and a majority of the voters of a district having determined that it would be detrimental to the public to permit liquor to be either sold in, or shipped to, that district, does the law place it *beyond* the power of the carrier to make a regulation for the purpose of carrying into effect the expressed will of the people? The Legislature was not dealing with a subject over which it had *no jurisdiction* whatever, and even conceding that it had no power to prohibit shipments originating *outside* the State, and that we must disregard all it has said on that subject, its prohibition of shipments between points *within* the State was a determination that the shipment of any intoxicating liquor into the district would be injurious to the public, for, of course, it could not find that liquor shipped from a point *inside* the State would be harmful, and that such liquor shipped from a point *without* the State would not be harmful. We thus

have a legislative determination that the shipment of such liquor into the particular district from *any* point would be dangerous to the health, safety and good morals of the people of that district, and the question is whether or not the carrier has any right to aid the people in avoiding that danger. The carrier may refuse to carry high explosives because of the danger to life and property, although such explosives are essential to the conduct of useful business enterprises, but the theory upon which the statute in this case is based is that liquor is not only dangerous to life and property, but to the health and good morals of the people. If a man fills himself with liquor and then "shoots up" the town, he is more dangerous than a car of dynamite properly handled, and while that result does not always follow the use of liquor, we have the right to act upon the assumption that when a majority of the people of a particular district have voted against the sale of liquor in that district they were trying to protect themselves from that danger, and to say that a common carrier may *not* refuse to carry into a particular district an article which the people therein are so afraid of that they are *unwilling* to have it shipped into the district, and which can not be lawfully sold or given away after it is brought into the district, is to wholly ignore the rule which allows common carriers to make *reasonable* regulations restricting their business to the carriage of such articles as they can carry without risk to themselves or others.

In *Adams Express Co.* v. *Commonwealth*, 5 L. R. A. (N. S.) 630, 92 S. W. 932, which involved the lawfulness

of a shipment of liquor from another State into a local option district, the Court of Appeals of Kentucky said:

> The question involved here is a most important one for the people among whom the offense was committed. The mountain counties of Kentucky are thinly populated, and the arm of the law is necessarily weak, and the passions of men correspondingly strong. We do not transcend the bounds of judicial conservatism in saying that a very large number of the cases involving violent crimes which come to this court, on appeal from that section of the State, are directly caused by the use of whiskey. Largely influenced by this consideration, no doubt, the good people of a majority of the mountain counties have sought to control crime by the enactment of prohibition laws, and the welfare of the whole community is bound up in the enforcement of these laws. It goes without saying, however, that if, by the instrumentality of such transactions as we have under discussion, whiskey can be introduced and sold by retail through the aid of the express company, which makes itself the agent to deliver the spirits and collect the pay therefor, the law is reduced to a nullity. We do not believe that an express company can legitimately thus thrust the shadow of its greed between the people and their uplift.

That case did not arise under the statute prohibiting the carrying of intoxicating liquors into local option districts, but under the law prohibiting the *sale* in such districts, the question being whether the sale took place in Ohio or in the Kentucky local option district, but as the statute we are considering is merely in aid of that law,

what the court said there has much force as applied to the right of the carrier to refuse to ship into a local option district. The theory of the local option law is that conditions are not the same in all localities, and that there may be reasons for prohibiting the sale of liquor in one district which do not exist in another, and to say that a common carrier may not refuse to ship liquor into a district in which there is a lawless element which constitutes a menace to the public when its passions are inflamed by liquor, would be equivalent to saying that a common carrier must ship everything that is offered, regardless of the danger to the public and to itself. It may be that a common carrier would not have the right to determine for itself that certain things would be hurtful to the public, and refuse to carry them for that reason, but when the Legislature of the State has spoken and determined that question, the carrier may act upon that decision. If the Legislature should prohibit the shipment of diseased cattle into a certain section of the State, would any one say that the carrier would not have the right to refuse to ship such cattle into that district from *other States*, regardless of the validity of the statute as to *interstate* shipments? We think not, and yet the regulation we are considering is based upon exactly the same principle.

In *Champion* v. *Ames*, 188 U. S. 321, this court in upholding an Act of Congress prohibiting the carriage of lottery tickets by express companies engaged in interstate commerce, said:

> In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, *to be overthrown or disregarded by the agency of interstate commerce.* We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, can not be met and crushed by the only power competent to that end.

The shipment of lottery tickets was held in that case to be interstate commerce, and if the express companies had refused, without waiting for such legislation, to accept lottery tickets for shipment, the courts would hardly have held that they were violating any duty which they owed the public. If Congress could say it would not permit the declared policy of the States to be overthrown *by the agency of interstate commerce,* surely the carriers themselves may say that they will not so conduct their business as to overthrow the declared policy of the States. Why should a carrier be required to wait for legislation by Congress requiring it to refrain from doing that which the Legislature of the State has declared to be hurtful to its people?

In *Austin* v. *Tennessee*, 179 U. S. 343, this court held that paper packages each containing ten cigarettes, and carried from one State to another in a basket, from which they were emptied upon the counter of the consignee, did not constitute original packages so as to exempt them from the operation of a law of the State into which they were carried prohibiting the sale of cigarettes, using this language:

> Without undertaking to determine what is the proper size of an original package in each case, evidently the doctrine has no application where the manufacturer puts up the package with the express intent of evading the laws of another State, and is enabled to carry out his purpose *by the facile agency of an express company and the connivance of his consignee.* This court has repeatedly held that, so far from lending its authority to frauds upon the sanitary laws of the several States, we are bound to respect such laws and to aid in their enforcement, so far as can be done without infringing upon the constitutional rights of the parties.

One who sells goods to be delivered in another State may have the constitutional right *to deliver* them, but he has no constitutional right to have them delivered *by a carrier* who does not profess to carry that class of goods, but refuses to do so for any one, after giving due notice to all.

In *Cook* v. *Marshall County*, 196 U. S. 261, in which the court followed *Austin* v. *Tennessee, supra*, the facts being almost identical, it was said:

> While this court has been alert to protect the rights of non-resident citizens, and has felt it its duty, not always with the approbation of the State courts, to declare the invalidity of laws throwing obstacles in the way of free intercommunication between the States, *it will not lend its sanction to those who deliberately plan to debauch the public conscience and set at naught the laws of a State.* The power of Congress to regulate commerce is undoubtedly a beneficent one. *The police laws of the State are equally so, and it is our duty to harmonize them.* Undoubtedly a law may sometimes be successfully and legally avoided if not evaded; but it behooves one who stakes his case upon the *letter* of the Constitution not to be wholly oblivious of its *spirit.* In this case we can not hold that plaintiffs are entitled to its immunities without striking a serious blow at the rights of the States to administer their own internal affairs.

In *Mugler* v. *Kansas,* 123 U. S. 662, this court, in upholding a statute of the State of Kansas prohibiting the manufacture and sale of liquor in that State, said:

> There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we can not shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism and crime existing in the country are, in some

> degree at least, traceable to this evil. If, therefore, a State deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific and manufacturing purposes, to be necessary to the peace and security of society, the courts can not, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the Constitution to another department. And so, if in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community to disregard the legislative determination of that question.

That is a strong statement of the evils which prohibition laws are intended to prevent, and it would be an anomaly if carriers could not adopt regulations *reasonably adapted to prevent the violation of such laws,* especially when the particular regulation has been approved by the legislature and the people of the State which created the carrier a corporation, and granted to it all its powers and franchises.

In *State* v. *Goss*, 59 Vt. 266, 30 A. & E. R. Cases, 118, the Supreme Court of Vermont held:

> Although express companies are common carriers, and liable as such, yet the law neither requires nor permits them to do illegal acts; and they are not *bound* to transport and deliver intoxicating liquor or other commodities, if thereby they would commit an offense or incur a penalty. They can not be allowed, any more than other people, knowingly and with impunity, to make themselves agents for others to break the laws of the State.

It has been held that a carrier may lawfully refuse to carry goods where such service will be exposed to peculiar and unusual danger, for instance, to the fury of a mob.

In *Pearson* v. *Duane*, 4 Wall. 605, this court held that the captain of a ship would be justified in declining to receive a passenger who desired to return to San Francisco, from which city he had been banished by a vigilance committee, of course, without authority of law. The court in that case, at page 615, said:

> If there are reasonable objections to a proposed passenger, the carrier is not required to take him. In this case Duane could have been well refused a passage when he first came on board the boat if the circumstances of his banishment would, in the opinion of the master, have tended to promote further difficulty should he be returned to a State where lawless violence was supreme.

It will be seen, therefore, that irrespective of whether the consequences of popular indignation may be apprehended through the processes of the law or through mob violence, that apprehension serves as a justification for the carrier's refusal to perform a service which involves such dangers, and, regardless of whether a State statute prohibiting the importation or sale of intoxicating liquor is valid as applied to interstate shipments, the expectation of even illegal prosecutions by the constituted local authorities would alone be sufficient to sustain the carrier in establishing a rule, such as the one adopted by appellant, to say nothing of the hostility which would be naturally, if not inevitably, engendered, and consequent loss of general business, by the mere act of carrying such liquor into a local option district, in opposition to the cherished views of a majority of the people thereof, as well as in violation of the statute of the State. In such localities the people of the district, the county, or the State, by their votes upon the question of prohibition, have set the seal of disapproval upon the liquor traffic in their respective localities, and, so far as they have been able to do so, they have done away with the sale of liquor because in their judgment it was injurious to the public welfare of the community. *Any agency,* therefore, which by reason of the national control of interstate commerce, lends itself to the distribution of liquor in such communities *from points outside of the State,* must necessarily be obnoxious to the people who are endeavoring to stamp out the liquor traffic. This disapproval, of course, must be borne by the common carrier so far as

his obligation as such *compels* him to carry liquor into such communities. But when the additional facilities offered by the carrier are abused by those seeking to evade local laws by encouraging and abetting *illicit vendors* of contraband goods, and by making it possible for "bootleggers" and "blind tigers" to flourish in such communities, then the *carrier itself becomes identified in the minds of the people with such unlawful enterprises and must expect to receive the consequences of such disapproval in restrictive legislation, in burdensome taxes, in loss of general business, and in prosecutions because of its apparent disregard of public sentiment and the law.*

In the opinion of the court below it is said (R. 39):

> In the argument it was suggested that a good reason for making the difference between beer shipments to "wet" and to "dry" counties might be found in the damage to its business which appellant might suffer from fines, costs, withdrawal of patronage, punitive regulations, etc., if it should fail to obey the void Kentucky statute. That is speculation for which we find no warrant in the record.

The court will take judicial notice of those natural and usual effects which flow from certain causes and conditions, whose existence is conceded. It was not necessary, therefore, to set out in its answer all the details, showing the reasonableness of the regulation established by appellant, after the passage of the Kentucky Statute of March 21, 1906.

Already Congress has made considerable progress in providing restrictions upon the interstate transportation of intoxicating liquors by common carriers.

Under the Act of Congress approved March 4, 1909, constituting Sections 238, 239 and 240 of the United States Compiled Statutes, Supplement 1909, it is provided in substance that any officer, agent, or employe of any railroad company, express company or other common carrier, who shall knowingly deliver or cause to be delivered to any person other than the person to whom it has been consigned, unless upon the written order in each instance of the bona fide consignee, or to any fictitious person or to any persons under a fictitious name, any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, which has been shipped from one State into another State, or from any foreign country into any State of the United States, shall be fined not more than $5,000 or imprisoned not more than two years, or both; and any such common carrier, who in connection with the transportation of any such liquors from one State into another State, or from a foreign country into any State of the United States, shall collect the purchase price or any part thereof before, on, or after delivery from the consignee, or from any other person, or in any manner act as agent of the buyer or seller of any such liquor for the purpose of buying, selling and completing the sale thereof, save only in the actual transportation and delivery of the same, shall be fined not more than $5,000.

Furthermore, it is provided in said Act that whoever shall knowingly ship or cause to be shipped from one State into another State, or from a foreign country into any State of the United States, any package containing such liquors, unless the same shall be so labeled on the outside cover as to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein, shall be fined not more than $5,000, and such liquor shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law.

The people of prohibition States and of localities in other States who have voted out or prohibited the sale of intoxicating liquors have been long-suffering in waiting upon an Act of Congress positively prohibiting the transportation of such liquors from points without to points within such States and localities; and, in the absence of Federal legislation to that end, we insist that it is within the lawful powers of interstate carriers to establish reasonable regulations (such as this record shows appellant unselfishly adopted, foregoing the revenue to be derived from such traffic), after due notice to the public, whereby they will not transport or deliver such liquors to points in prohibition territory, no matter whether the same be interstate or intrastate traffic.

If such regulations, when established by the interstate carriers, shall be upheld by this court as reasonable and lawful, the common declaration that "prohibition does

not prohibit" would no longer be heard in the land, even if Congress should continue to fail or refuse to pass an Act to accomplish the same object.

In Kentucky to-day there are ninety-six (96) "dry" counties, and only twenty-three (23) "wet" counties. When the shipping of intoxicating liquors across State lines into "dry" counties shall be stopped the day of the "blind tigers" and "boot-leggers" will be ended, and the will of the people will prevail.

In *Adams Express Co.* v. *Commonwealth of Kentucky*, 206 U. S. 129, where the lawfulness of an interstate shipment was involved, under the C. O. D. section of the local option law of Kentucky, enacted in 1902, this court said (137-8):

> We do not mean to intimate that an express company may not also be engaged in selling liquor in a State contrary to its laws, or that the fact that a consignee did not order a shipment might not be evidence for a jury to consider upon the question of whether the company was not, in addition to its express business, also selling liquor contrary to the statutes. It is enough to hold, as we do, that *under the averments of this indictment*, such testimony is immaterial. It is, of course, a question of fact whether a carrier is confining itself strictly to its business as a carrier, or participating in *illegal sales*. The consignor alone may be trying to evade the statute. He may forward the liquors in the expectation that the consignee will, *when informed of their arrival*, take and pay for them. So the fact that there is *no previous order* by the consignee *may not*

*be conclusive of the carrier's wrongdoing, but still it is entitled to consideration in determining that question.*

In *Milwaukee Malt Extract Co.* v. *Chicago, etc., R. Co.*, 73 Iowa, 98, the Iowa Supreme Court held that a carrier had the right *to refuse* to carry a beverage called "beer" into a local option district, under a law prohibiting the carrying of spirituous, vinous, or malt liquors into local option districts, although the consignor insisted that the so-called "beer" was not a spirituous, vinous or malt liquor, and was not intoxicating, and although on investigation it was found that this statement of the consignor was true—the court holding that the carrier was *not bound* to decide whether the so-called "beer" was spirituous, vinous or malt liquor, but had the right to assume that it was, when it was tendered for shipment. As an illustration, the court said that if the liquid were called "brandy" the proposition would be even clearer.

It may be, and no doubt will be, urged that if the carrier can relieve itself of its duties as a common carrier of intoxicating liquor by giving the appellee as well as the public notice that it will decline to carry such liquor, it can in the same way relieve itself of the carrying of any article of commerce, and thus bring about great confusion and inconvenience to the public. This, however, does not necessarily follow. There is a manifest and well-recognized difference between intoxicating liquors and all other kinds of merchandise. By the common consent of mankind the trade in intoxicants is regarded as dan-

gerous and a menace to the pubilc. This is the basis of all restrictive legislation enacted under the police powers of the States applicable to the liquor traffic, and which could not be made applicable lawfully to other classes of merchandise. Not only so, but State-wide prohibition has been established in many States, and is regarded as valid legislation. It seems that such liquor is an article which is in a class by itself; and it is made, by the Act of Congress known as the "Wilson Act," passed in 1890, subject to the will of the State, and so it is competent for the Legislature to prohibit the *sale* of liquor *in original packages by the consignee* within the limits of the State, although it may have been shipped from a point without the State and thus have been the subject of interstate commerce.

Intoxicating liquor is not on a par with other articles of commerce anywnere in the United States. The sale of liquor, under the laws of all the States, is primarily unlawful, and it is only legalized by the possession of a State as well as a Government license to sell, which license in every case is issued in the name of a particular person and prescribes the quantities in which that person may lawfully sell. For any person, not holding such a license, to sell such liquor, is a violation of law punishable under the laws of every State in the Union, and, separately, under the laws of the United States.

The sale of liquor is not an absolute right of the citizen, but it is a privilege for which a specific authority must be granted, and its sale and its transportation are hedged about with statutes and regulations *which the*

*carrier must regard in the acceptance of shipments of this nature.* In the case of almost every other kind of merchandise, the carrier's lien for transportation charges enables him *to sell the article for the charges if the same are not paid. This is not true of shipments of liquor. If shipments of liquor are for any reason refused by the consignee or remain undelivered, the only recourse of the carrier is to take the shipment back to the shipper or beyond prohibition territory, in order to sell it and thus obtain its charges for transportation.*

It, therefore, does not follow that a rule or regulation which would be reasonable and valid so far as intoxicating liquor is concerned, would be reasonable and valid so far as some other article of commerce, *which is not put in a class by itself, as such liquor is, would be concerned.*

The case of *Platt* v. *LeCocq*, 158 Fed. 723, involved a question of discrimination against currency shipments, the carrier having refused the same the advantage of storage over night, which the carrier was accustomed to afford other descriptions of traffic. The Court of Appeals of the Eighth Circuit held that due reference must be had to the welfare of the carrier, and also, after a careful consideration of the advantages and disadvantages on both sides, that the discrimination there complained of was reasonable, using this language:

> A common carrier has the right to conduct its business in its own way in accordance with the rules of the common and statutory law. It is bound to receive and to transfer goods of the character, *which*

> *it offers to carry,* at reasonable times and places, but at no other times and places. It has the right to make and enforce *reasonable regulations* which may lawfully fix the times, the places, the methods, and the forms in which it will receive the various commodities it undertakes to carry, and the rules which it thus adopts are presumptively right and reasonable. The burden is on him who assails them to prove that they are unfair and unjust, *and it is only when it clearly appears that they are unreasonable* that commissions or courts may lawfully interfere to annul or to change them.

It is insisted, upon the principles defined in the text books concerning the duties and liabilities of common carriers, and sustained by the decisions of the Federal as well as the State courts above cited, that the rule of the appellant, complained of herein by appellee, is a *reasonable,* and, therefore, valid rule, and one that should be encouraged and upheld, instead of nullified, by a court of equity.

In behalf of the appellant we respectfully submit that the decree appealed from, by reason of the errors assigned and relied upon, should be reversed, with direction to the court below to dissolve the injunction granted by the Circuit Court and dismiss appellee's bill.

HENRY L. STONE,
*Attorney for Appellant.*

PHILIP W. FREY,
GEORGE R. DEBRULER,
*Of Counsel.*

## Points and Authorities Cited.

### I.

THE VANDERBURGH CIRCUIT COURT OF INDIANA HAD NO JURISDICTION OF THE SUBJECT-MATTER OF THIS ACTION.

Act to Regulate Commerce, Sections 1, 3, 10, 13, 15, 16, 22, 23.
Louisville & Nashville R. R. Co. v. The F. W. Cook Brewing Co., 172 Fed. 117.
Central Stock Yards v. Louisville & Nashville Railroad Company, 112 Fed. 823.
Texas & Pacific R'y Co. v. Abilene Cotton Oil Co., 204 U. S. 426.
Howard Supply Co. v. Chesapeake & Ohio R'y Co., 162 Fed. 188.
11 Cyc. 684.
Western Union Telegraph Co. v. Western & Atlantic Railroad Co., 8 Baxter (Tenn.), 54.
Baltimore & Ohio R. R. Co. v. United States, ex rel., Pitcairn Coal Co., 215 U. S. 481.
Danciger v. Wells, Fargo & Co., 154 Fed. 379, 381-3.

### II.

AFTER REMOVAL IT WAS THE DUTY OF THE CIRCUIT COURT TO DISSOLVE THE TEMPORARY RESTRAINING ORDER AND DISMISS THE ACTION.

Fidelity Trust Co. v. Gill Car Co., 25 Fed. 737.
Foster's Federal Practice, Sec. 391, pp. 955-6, and authorities cited in note 22.

Auracher v. Omaha & St. L. R. Co., 102 Fed. 1.
Swift v. Philadelphia & Reading R. Co., 58 Fed. 858.
Sheldon, *et al.* v. Wabash R. Co., *et al.*, 105 Fed. 785.
Cowley v. Northern Pac. R'y Co., 159 U. S. 569.
Mastin v. Chicago, R. I. & Pac. R'y Co., 123 Fed. 827.
Sec. 6, Judiciary Act of March 3, 1891, 26 Stat. at L. 826.

## III.

## EVEN IF THE STATE COURT HAD JURISDICTION, THERE WAS NO EQUITY IN THE BILL.

Peoples U. S. Bank v. Gilson, 161 Fed. 286.
Perkins v. Nichols, 11 Allen (Mass.), 542.
American Carpet Lining Co. v. Chipman, 146 Mass. 385.
Banks v. Manchester, 128 U. S. 244.

## IV.

## THE RULE OF THE APPELLANT THAT IT WILL NOT ACCEPT, TRANSPORT OR DELIVER INTOXICATING LIQUORS CONSIGNED TO POINTS IN KENTUCKY, WHERE THE SALE OF SUCH LIQUOR IS PROHIBITED BY LAW, IS REASONABLE AND VALID.

Dickson v. G. N. R'y Co., 5 Eng. Rul. Cas. 358.
5 A. & E. Ency. of Law (2 Ed.), page 162.
Elliott on Railroads, Vol. 4, Sec. 1465, 1466.
Moore on Carriers, Sec. 5, p. 98.

1 Hutchison on Carriers, Secs. 144, 145, 147.
Harp v. Choctaw, etc., R. Co., 118 Fed. 169, 125 Fed. 445.
Interstate Commerce Commission v. Cincinnati, etc., R. Co., 167 U. S. 479.
Interstate Commerce Commission v. Baltimore & Ohio R. Co., 43 Fed. 37.
Kansas Pacific R. R. Co. v. Nichols, 9 Kans. 243.
Johnson v. Midland R'y, 4 Exch. 367.
Hall v. Decuir, 95 U. S. 485.
Crigler, etc., v. Commonwealth, 27 Ky. Law Rep. 921, 87 S. W. 276.
Adams Express Co. v. Commonwealth, 30 Ky. Law Rep. 207.
Adams Express Co. v. Commonwealth, 5 L. R. A. (N. S.) 630, 92 S. W. 932.
Champion v. Ames, 188 U. S. 321.
Austin v. Tennessee, 179 U. S. 343.
Cook v. Marshall County, 196 U. S. 261.
Mugler v. Kansas, 123 U. S. 662.
State v. Goss, 59 Vt. 266, 30 A. & E. R. Cases, 118.
Pearson v. Duane, 4 Wall. 605.
Adams Express Co. v. Commonwealth of Kentucky, 206 U. S. 129.
Act of Congress of March 4, 1909, Secs. 238, 239, 240, U. S. Com. Stats., Supplement 1909.
Milwaukee Malt Extract Co. v. Chicago, etc., R. Co., 73 Iowa, 98.
Platt v. LeCocq, 158 Fed. 723.

# IN THE
# SUPREME COURT
## OF THE UNITED STATES

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OCTOBER TERM, 1911.



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LOUISVILLE & NASHVILLE RAILROAD COMPANY,
*Appellant.*
v.
THE F. W. COOK BREWING COMPANY,
*Appellee.*

No. 64

---

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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BRIEF FOR APPELLEE.

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GEORGE A. CUNNINGHAM,
*Attorney for Appellee.*

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## BRIEF FOR APPELLEE.

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### STATEMENT OF THE CASE.

As very fully stated in appellant's brief this suit was originally brought in the Vanderburgh Circuit Court in the State of Indiana by the appellee to restrain the appellant from refusing to accept shipments

of beer tendered by the appellee to the appellant at Evansville, Indiana, and intended for shipment to appellee's customers at so-called local option points in the State of Kentucky.

The statement of the case made by counsel for appellant is substantially correct. It does not make quite plain, however, the fact that the purpose of the complaint was to compel the appellant to accept shipments of beer consigned to appellant's customers generally in local option counties in the State of Kentucky. Indeed we think counsel's statement of the case slightly misleading in this that it would make it appear that the shipments of beer sought to be enforced by the appellee upon the appellant were to persons who expected to sell the same in the State of Kentucky in contravention of the laws of that State, thus placing the appellee in the attitude of making it possible for some one in the State of Kentucky to violate the law, while the appellant claims that it is pursuing a course intended to prevent violations thereof. While it is true, as suggested in appellant's brief, that the shipments of beer especially mentioned in the complaint were to persons having unexpired licenses, still the allegations of the complaint, the averments of the answer, and the restraining order issued are broad enough to cover all shipments of beer intended to be made by the appellee to its customers in local option districts in the State of Kentucky, whether dealers in beer or not.

A reference to the prayer for relief contained in the complaint, which appears at the bottom of page 5 of the record, is sufficient to show that the few shipments intended for persons having unexpired licenses, were mere incidents of the general relief prayed for, which was that the appellant be restrained from refusing to accept shipments of beer destined to local option or other points on its line of railway in the State of Kentucky.

It is not claimed, as we understand it, that there is any law or policy of the State of Kentucky that prohibits any of its citizens from using beer or evens tronger liquor. Whether or not, however, this be the case, there is and can be no law or policy in force in the State of Kentucky that will prevent a citizen of another state from shipping to a citizen of the State of Kentucky beer or other intoxicating liquor so long as interstate commerce is under the protection of the federal government.

With these suggestions, for the present at least, the statement of facts of the case as made by counsel for appellant, may be accepted as substantially correct.

## BRIEF OF ARGUMENT.

Stating the case briefly, the Vanderburgh Circuit Court, by mandatory injunction, required the appellant to accept all shipments of beer tendered by the appellee and accompanied by tender of proper freight charges consigned to its customers generally in so-called local option districts in the State of Kentucky. The case was removed to the Circuit Court of the United States for the district of Indiana, which court not only declined to dissolve the temporary restraining order, but on final submission of the cause made the same permanent. An appeal having been taken to the Circuit Court of Appeals for the Seventh Circuit, that court affirmed the judgment of the Circuit Court.

*L. & N. Railroad Co., v. F. W. Cook Brewing Co.*, 172 Fed. Rep. 117.

## DOES AN APPEAL LIE TO THIS COURT IN THIS CAUSE?

Counsel for the appellant in their brief, page 44, assume that an appeal lies from the decision of the Circuit Court of Appeals to this court under Section 6 of the Act of March 3, 1891.

26 Stat. at L. 828.

This section, after providing for the appellate jurisdiction of the Circuit Court of Appeals, provides as follows:

> "And the judgments or decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states."

Counsel seek to escape the effect of this language by the claim that this case arises under the constitu-

tion and laws of the United States. "Which fact," (we quote from appellant's brief, page 44) "appears from the appellee's statement of its case in the state court, as well as in appellant's petition for removal, and the matter in controversy as averred in appellant's said petition, exceeds $1,000.00, besides costs."

It is true that the appellant's petition for the removal of this cause from the state to the federal court does aver that, "this suit arises under the constitution and laws of the United States, and especially under an act to regulate commerce, passed by the Congress of the United States on the 4th day of February, 1887, and amended by an act of said Congress passed on the 29th day of June, 1906."

Transcript page 10.

It is to be observed, however, that the real ground upon which the appellant sought and obtained the removal was diversity of citizenship.

The appellee submits, therefore, that this suit does not arise under the interstate commerce act as we think will be apparent from the authorities hereafter referred to in discussing the merits of the controversy, that it does not arise under the constitution and laws of the United States as contended in appellant's brief and that under the decisions of this court the appeal should be dismissed.

*Empire State-Idaho M. & D. Co., et al, v. Hanley*, 198 U. S. 292, 49 L. Ed. 1056.

*Arbuckle et al v. Blackburn*, 191 U. S. 405, 48 L. Ed. 239.

*Spencer v. Duplan Silk Co.*, 191 U. S. 526, 48 L. Ed. 287.

*Bonin v. Gulf Co.*, 198 U. S., 115, 49 L. Ed. 970.

*Bankers' Mut. Casualty Co. v. Railway Co.*, 192 U. S., 371, L. Ed. 484.

*Cochran v. Montgomery County*, 199 U. S. 260, 50 L. Ed. 182.

*Chapman v. Brown*, 207 U. S. 88, 52 L. Ed. 116.

*Empire State-Idaho M. & D. Co., v. Hanley*, 205 U. S. 225, 51 L. Ed. 779.

*Weir v. Rountree*, 216 U. S. 603, 54 L. Ed. 635.

*St. L. R. C. & C. R. Co., v. Wabash Co.*, 217 U. S. 247, 54 L. Ed. 752.

*Bagley v. General Fire Ex. Co.*, 212 U. S. 477, 53 L. Ed. 605.

Should the court be of opinion that an appeal lies, the appellee submits most earnestly that the judgment of the court below was correct and should be affirmed for the following reasons:

Without noticing in detail the errors assigned, it is sufficient to state that they depend upon the correctness on several propositions of law asserted by the appellant, and of these in their order:

I.

First: It is insisted that the Vanderburgh Circuit Court had no jurisdiction of the subject matter of the action. This want of jurisdiction is predicated upon two propositions:

(1) That the remedies sought to be enforced are derived from the Interstate Commerce act and can only be enforced in the manner provided therein; and

(2) That the subject matter of the action was not within the jurisdiction of the Vanderburgh Circuit Court in this, that the order sought to affect property and the rights of parties beyond the territorial jurisdiction of the State of Indiana.

In support of the first proposition appellant's brief refers with some detail to the provisions of the Inter-

state Commerce Act and the conclusion sought to be deduced is that the rights of the appellee depend upon that act and must be enforced according to the provisions thereof.

It is claimed that the appellee must rely on Section 3 of the Act of June 29, 1906, which is as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Certainly it will not be contended that prior to the enactment of this section a shipper had no right by mandatory injunction to compel a common carrier to accept his goods upon offering to pay the reasonable transportation charges. If the position of the appellant is correct then in substantial effect all courts other than those designated by the Interstate Commerce Act are deprived of jurisdiction to enforce the rights of shippers. In view of the well-known purposes of the act and the history connected with its adoption and enforcement it cannot be necessary to combat this statement. To suppose for a moment that it was intended to curtail or diminish in any way the rights the shipping public already had would be to do violence to the well-known purpose of congress to provide additional rights and safeguards for the protection of their interests.

Counsel for appellant proceed to argue that the appellee should have proceeded under Section 9 of the Act and made its complaint to the Commission or

brought suit for damages in any District or Circuit Court of the United States having jurisdiction, or that it should have pursued one of the other methods provided for by the Act, all of which would have involved great delay and inconvenience.

We do not believe appellant's position on this point will commend itself for a moment to the favorable consideration of the court. However, the Act itself makes it plain that it was not intended thereby to take away any existing remedies. It is provided in Section 22 as follows:

> "Nothing in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

In a few lines counsel for appellant seek to dispose of this provision by the adroit suggestion that the remedy by injunction is neither a common law nor a statutory remedy, and that, therefore, it was not within the saving clause of the statute. No reason is given or suggested why congress, careful as it was to preserve all existing remedies, should deprive the shipper of the one frequently most prompt and efficient. To give the language, the meaning contended for would be a striking example of what lawyers sometimes refer to as "sticking in the bark." But appellant's contention is supported neither by reason nor authority. The term "common law," especially as distinguished from the written or statutory law, has a well-defined meaning. We quote from the first volume of Kent's Commentaries, page 533, as follows:

> "The common law includes those principles, usages and rules of action applicable to the government and security or person and property which do not rest for their authority upon any express and positive declaration of the will of the legislature."

It was, of course, in this broad and general sense that the term was used by Congress.

A number of cases are cited which it is claimed sustain the contention that the remedies provided by the Interstate Commerce Act are exclusive. It is submitted that an examination of these cases will show clearly that the remedies provided by the Act are exclusive only when it is sought to enforce some provision of the Act itself, and not when it is sought to enforce a right theretofore existing either at common law or by statute, unless the enforcement of such right is by the act committed to some other tribunal.

For instance, in the case of the *Central Stock Yards Co. v. L. & N. R. R. Co.*, 112 Fed. Rep. 823, it was sought by the complainant, the Central Stock Yards Company, to compel the L. & N. R. R. Company to bill certain shipments of cattle to a point other than its regular live stock depot at Louisville. Inasmuch as there was such physical connection with the tracks of the L. & N. as would have made the delivery at the place proposed by the complainant possible it was contended that, under the Interstate Commerce Act, the L. & N. was required to make the connection and delivery proposed. Really all that was decided in this case was a denial of the preliminary injunction sought; but the following language of the court on page 826, makes it perfectly clear that the complainant was seeking to enforce a right created by the Act:

> "It will thus appear that congress has not only created a new right by Section 3 of the Act—a right which did not exist at common law nor by any previous congressional enactment—but has also by the same Act expressly provided remedies to protect and enforce that right by Sections 8 and 9. Are not those remedies thus provided exclusive of all others? The court is strongly inclined to be-

lieve that this question must be answered in the affirmative upon the very explicit language found in the opinions in the following cases," citing a number of authorities.

The case of *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, is also cited in support of this contention. In that case the railroad company had complied with the Interstate Commerce Act in establishing, publishing and filing with the Commission a schedule of rates. The shipper conceived that this schedule in the particular case involved was unjust, and instead of appealing to the commission, paid the freight and sued to recover what it conceived to be the unreasonable excess. The result of the court's reasoning was to the effect that to permit the shipper to maintain such an action would be to permit the question of the reasonableness of the rate to be determined by two entirely different tribunals which might reach entirely different results, and that such a procedure would in effect nullify that part of the Act. In other words, the question of fixing reasonable rates is a matter committed exclusively to the Interstate Commerce commission, and when the carrier has complied with the Act concerning the schedule of rates they can only be attacked in the manner provided for in the Act. Of course no such question arises in the case at bar. It is not a question of rates at all. The carrier simply declined, for the reasons given in its answer, to accept the shipper's merchandise. These reasons were not based in any respect upon any matters committed by the Act to the jurisdiction of the Commission.

To adopt appellant's view would be equivalent to saying that a shipper cannot go into court to redress any sort of grievance, but must apply in the first instance to the commission. Such was not the purpose of the Act and in this connection the language of the

Supreme Court in the case just cited is material. We quote thereform, page 437, as follows:

> "The Act made it the duty of the carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing a public schedule of such rates. It forbade all unjust preference and discriminations; made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the Act," etc.

It is pertinent to note the language of the court on page 446, in reference to the saving clause in Section 22 of the Act above quoted. The court held that this saving clause could not avail the shipper for the reason that to give it this effect would be to nullify a part of the Act itself. It was held that to permit the shipper to settle the question of the reasonableness of the rate in the state court was absolutely inconsistent with the Interstate Commerce Act, which vested the determination of this matter in the Commission. No suggestion is made that the enforcement of the appellee's rights in this action will in any sense impair any of the provisions of the Act by or any possibility come in conflict with any decision the Commission may ever make. Indeed, it was never for a moment supposed that any such question as the one involved here would be brought before the Commsision for determination.

As above observed, the Interstate Commerce Act was intended to provide for just, reasonable and uniform rates and was not intended to supersede or take the place of other existing remedies, except where the enforcement of such remedies would have the effect of nullifying the Act itself by vesting the determination of questions arising thereunder in tribunals other than those named in the Act. True, it is shown by the record that appellant's circular announcing that there-

after it would decline to accept shipments of intoxicating liquors consigned to local option points in Kentucky, was filed with the Interstate Commerce Commission. It is hardly necessary to say that this amounted to nothing for the reason that there was no law authorizing it so to do. The Interstate Commerce Act takes no notice of the question of prohibition or local option. Furthermore, the only schedule required to be filed is a schedule of rates and an examination of the schedule referred to will show that it simply sets out an Act of the legislature of the Commonwealth of Kentucky, and names certain points in that state to which it would decline to ship intoxicating liquors. There is no provision in the Act requiring, or even permitting, any such statement or declaration to be filed, and it therefore derives absolutely no virtue from the fact of having been so filed.

But this exact question has been decided adversely to appellant's position in *Danciger et al v. Wells-Fargo & Co.*, 154 Fed. Rep. 379. This was an action for a mandatory injunction to require the defendant to carry intoxicating liquor from Kansas City, Missouri, to various parts of the country. The following language of the court shows not only the contention there made by the carrier, but the ruling of the court thereon:

> "A further contention made by the defendants is that the court of exclusive original jurisdiction in this controversy is the Interstate Commerce Commission and that this court has no jurisdiction in the first instance to afford to complainants the relief here sought; and much reliance is placed by the defendants on the case of *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct., 350, 51 L. Ed. 553. From a reading of that case I do not consider it applicable to the state of facts here presented. If the controversy here was as to

whether the defendants were charging excessive or unreasonable rates for the shipments tendered by complainants, the case relied upon would, to my mind, be in point; but as the ground of relief sought by complainants in the case at bar is the performance by defendants of a duty imposed upon them by law, which they wholly neglect and refuse to perform, I think such question is one for the determination of the courts."

Appellee submits, therefore, that the contention that it must have applied first to the Interstate Commerce Commission or to some court therein designated is absolutely without support in law.

Had the Vanderburgh Circuit Court jurisdiction of the subject matter and of the parties so that it was authorized to issue a temporary restraining order? The appellant's argument is that because it was directed by the court in Indiana to receive and ship beer, billed at that point and destined for points in Kentucky, therefore, the Indiana court sought to affect persons and property beyond its jurisdiction. Where, then, was the appellee to bring its proceeding? Had it gone to Kentucky the officers and agents of the corporation there could have truly answered that they could not be compelled to accept shipments of beer in Indiana. There is no tribunal with jurisdiction broad enough to reach the persons and property in both states. Therefore, the shipper is wholly without remedy. Certainly no such reproach will be cast upon the law. No one will question the correctness of the general principles announced by the authorities cited by appellant to the effect that generally speaking the courts of one state can issue no process affecting persons or property in another state. It is not necessary, however, to cite authorities upon the elementary proposition, that where the courts of one state have jurisdiction of the

parties it may in certain instances affect the title to property situate in another. Of course, it can do this only by operating upon the persons within its jurisdiction and punishment for contempt for disobedience of the order of court is possibly the only final process that can be made effective. There is no denial of the proposition that the Vanderburgh Circuit Court had jurisdiction over the person of the appellant. No question was made as to the regularity of service and it appeared by counsel and asked for the removal of the cause to the Circuit Court of the United States for the District of Indiana. At no time, as shown by the record, has there been any suggestion that the defendant was not properly in court. It is well settled that where a court has jurisdiction of the parties, especially in cases of injunction and specific performance, it will grant relief, even though the property to be affected is in another state. Even proceedings in the courts of one state may be enjoined by courts of another state where the latter have jurisdiction of the parties.

I High on Injunctions, Fourth Edition, Sections 103, *et seq.* 6 Pomeroy's Equity Jurisprudence, Section 670.

*Eingartner v. Illinois Steel Co.*, 59 Am. St. Rep. 859, note.

*Hawkins v. Ireland*, 58 Am. St. Rep. 534, note.

*Hayden v. Yale*, 40 Am. St. Rep. 232.

But in the case at bar both the persons and the subject matter of the cause of action were within the jurisdiction of the court. It is not denied that the L. & N. Railroad Company has one of its intermediate *termini* at Evansville, or that it was properly brought into court in accordance with the practice in the State of Indiana. That the appellee had its place of business in Evansville, Indiana, and proposed to make the shipments of beer from that point is not denied. The court

had as complete jurisdiction of both the persons and the subject matter of the action as it could be possible for a court to have in any case of this nature. The mere fact that the delivery of the goods may have involved the performance of some duty by some employee of the appellant beyond the jurisdiction of the court cannot defeat the appellee's right to an injunction. Were the law otherwise it would never be possible to compel a carrier by mandatory injunction to receive and deliver goods. It could always escape upon the ground that the carriage and delivery would involve the performance of a duty by some one not before the court. This right was fully asserted in the case of the *C. B. & Q. Ry. Co. v. B. C. R. & N. Ry. Co. et al.*, 34 Fed. Rep. 481. The fact that the duty of the defendant company in that case was imposed by the statutes of Iowa as well as by the Interstate Commerce Act does not lessen the effect of the decision. The duty of a railroad company to serve the public is too well established to require the citation of authority. The question before the court relates to the enforcement of that duty and it is immaterial whether or not the duty is imposed by statute or common law. The defendant in the case just cited attempted to escape the performance of its duty upon the ground that by doing so it would involve itself in a strike of its locomotive engineers and firemen, but it was held this was no defense to the proceeding. This case with other like authorities is cited and approved in Hutchinson on Carriers, Third Edition, Section 149.

The case of *Bluthenthal et al. v. Southern Ry. Co.*, 84 Fed. Rep. 920, is interesting in this connection. In that case certain liquor dealers in Georgia had been shipping their goods to points in South Carolina. On account of the dispensary law of South Carolina they were compelled to ship and sell their goods in original packages. After receiving shipments for some time

the railroad company notified the liquor dealers that they would thereafter decline to accept shipments of liquor not packed in cases, casks or kegs. An injunction *pendente lite* was issued enjoining the railroad company from refusing to receive and transport complainant's goods. Although the decision is short, it is to the point and is well supported by the authorities generally. There was no suggestion in that case that because the goods were to be delivered in South Carolina the Circuit Court for the Northern District of Georgia did not have jurisdiction to act. Indeed, in none of the numerous authorities on this question is there any intimation that the court having jurisdiction of the parties is without authority to act merely because the merchandise in question is to be delivered in another state.

The right to mandatory injunction in cases of this kind is asserted in Elliot on Railroads, Second Edition, Section 1564, and fully sustained by the numerous authorities there cited. That mandatory injunction is the proper remedy to compel a carrier to accept shipments of intoxicating liquors which it refuses because of void State legislation, is expressly decided in:

*Danciger v. Wells-Fargo & Co., supra*, and

*Crescent Liquor Co. v. Platt*, 148 Fed. Rep. 897.

The second proposition made by the appellant that the court below should have dissolved the temporary restraining order and dismissed the action naturally falls with the first and we do not conceive it necessary to give it any further attention.

It is insisted next, that even if the state court had jurisdiction there was no equity in the bill. As the authorities establish the proposition that a shipper may, by mandatory injunction, compel a carrier to accept and ship his goods, and as no authority is cited by appel-

lant in support of their contention of want of equity, we think this proposition might well be left without further argument. It is sought, however, to make the appellant's right to an injunction hinge upon the six shipments mentioned in the complaint to customers having unexpired licenses. That these persons had unexpired licenses is denied in the answer. At least, it is averred, that their licenses have long since expired. Well, suppose the plaintiff's right was confined to those six shipments and the court should say that under the record they did not have unexpired licenses. What then? Does this fact defeat the right which the plaintiff had to ship them beer? Certainly not. Whether they had licenses at all or whether they had expired or unexpired licenses cannot affect the fact that they had the right to buy and the plaintiff had the right to ship them beer. As to what they were to do with the beer after they got it is a matter that does not concern the present controversy at all. That was between them and the authorities of the State of Kentucky. The plaintiff's right to ship the beer was a matter between it and the carrier, and the only one upon which the court is called to pass.

The complaint avers very fully that it is the purpose of the appellant to refuse to ship any beer offered by the plaintiff to so-called local option districts in Kentucky, whether to persons having unexpired licenses or not, and that, unless restrained by the court, it will refuse to accept and ship all such shipments. The answer not only does not deny this allegation of the complaint, but expressly admits it and attempts to defeat it upon the ground that it had the right to refuse these shipments for the reasons therein stated. The averments of the complaint are as broad and full, we submit, as can be found in the complaint in any of the actions in which similar relief has been granted.

Furthermore, the answer further avers that the restraining order issued by the Vanderburgh Circuit Court commands the appellant to receive and ship intoxicating liquors to any and all points in the State of Kentucky and to any and all points in the prohibition districts and counties in the State of Kentucky set forth in the bill of complaint without regard to the question whwther consigned to persons having unexpired licenses or not.

It is next insisted, that appellant has the right to make a rule that it will not accept, transport or deliver intoxicating liquors consigned to points in Kentucky where the sale of such liquor is prohibited by law.

Before noticing the legal proposition involved in this contention it may be well to recall some of the averments of the appellant's answer.

It starts out by alleging that on March 21, 1906, the legislature of the State of Kentucky passed an Act, making it unlawful for any person or corporation to transfer, bring or deliver any intoxicating liquor into any local option county or district of the State of Kentucky, and imposing penalties. It is averred that all of the places mentioned in the complaint are such local option dictricts and that if appellant should receive from the appellee any intoxicating liquor and convey it to such points, it would render itself liable to prosecution by indictment in the State of Kentucky for violation of this statute. Realizing, evidently, the invalidity of this Act, it is further averred that upon its passage the appellant, in the exercise of its right as a common carrier, adopted the rule relied on, namely: that it would not convey intoxicating liquor to any such local option district.

The claim is further made, that, inasmuch as the appellant is chartered by the laws of the State of Kentucky and has accepted the provisions of the constitu-

tion and laws of that state, therefore, this Act, even if void, possesses as to it some additional force that requires its observance.

It is also pertinent at this point to note that the Court of Apeals of the State of Kentucky on the third day of October, 1907, or about six months after this answer was filed, held this Act unconstitutional and void.

*Cincinnati N. O. & T. P. R. Co., v. Commonwealth*, 104 S. W. Rep. 394.

In this case the railroad company was indicted for transporting a box of beer from Cincinnati, Ohio, to Danville, Kentucky, and there delivered to the consignee in direct violation of the statute. The case was aggravated by the further fact that the liquor was brought from Kentucky to Cincinnati by the consignor and there shipped to the consignee in Kentucky. The court held, however, that this could make no difference; that no inquiry could be made or heard as to the knowledge or motives of the carrier; that under the law it was compelled to receive the beer at Cincinnati and transport it to Danville upon payment of reasonable charges, statute or no statute.

The court cites with approval the following decisions of the Supreme Court of the United States, which are pertinent to the question involved:

*Heyman v. Southern Railway Co.*, 203 U. S. 270.
*Rhodes v. Iowa*, 170 U. S., 412.
*Lord v. Goodall, etc. Co.*, 102 U. S. 541.

These decisions of the Supreme Court deal with the question of the transportation of intoxicating liquor from one state to another, and all reach the same conclusion, namely: that such transportation is Interstate Commerce and entirely beyond the control of the states.

The Court of Appeals of Kentucky in holding the Act in question invalid was only reiterating the doctrine often affirmed by the Supreme Court. In the very teeth of these decisions, so to speak, the legislature of the State of Kentucky passed the Act which forms really the basis of the appellant's position in this case. That as to interstate shipments it must fall before the first court that passed upon it could not have been a question of any serious doubt. Notwithstanding this the appellant resolved that it would make the Act effective by a resolution of its own adoption. It therefore promulgated the circular set out in the record and which the court is asked seriously to say infused life into an Act of the legislature of the State of Kentucky, condemned not only by the Supreme Court of the United States, but by the Appellate Court of the State of Kentucky itself. Can anything more be required than a statement of this proposition to show its fallacy? Suppose the legislature of the State of Kentucky should pass an Act that hereafter it shall be unlawful for any common carrier or other person or corporation to bring into the State of Kentucky, or into any county or district thereof, contrary to a decision of the people thereof, any colored person. We apprehend no one would argue in favor of the validity of such an Act. Suppose further, that the L. & N. Railroad has a copy of the Act made and sends the same to its various agents and files the same also with the Interstate Commerce Commission, together with a statement that thereafter it will not transport to the State of Kentucky, or to any county or district where the same may be prohibited by a vote of the people, any colored person. It is brought into court by some colored person denied transportation and by way of answer sets up the Act of the legislature and the further fact, that being a corporation of the State of Kentucky and having solemnly agreed to abide by its constitution

and laws it is bound by the Act, and that, if perchance the Act should be held void, it has adopted a rule that, hereafter it will not transport or carry any colored person contrary to the provisions thereof. Would it be listened to seriously by any court? Is it possible to distinguish any difference in principle between the case put and that before the court? We submit that it is not. But yet, in support of this contention, counsel for appellant cite a long array of authorities holding in the main what no one disputes, that a common carrier need not necessarily be a public carrier of all classes of merchandise. It may, indeed, carry only passengers. If it has no facilities for the transportation of live stock, and by its charter is not required to carry the same, of course it cannot be compelled to do so. A street railroad company cannot be required to carry cattle. The so-called interurban electric roads doubtless could not be required so to do unless they held themselves out to the public to that effect. Neither a railroad company nor any other corporation is required to do anything that is impossible or destructive of its own rights or property. It is not necessary to go beyond the authorities cited by counsel for appellant to show that they have no tendency even to support the contention made. To illustrate, the following quotation from the 5th volume of the Encyclopedia of Law, on page 32 of appellant's brief, very clearly indicates the line of distinction that the carrier is entitled to make:

> "The duty to accept for carriage and to carry goods tendered is not an absolute duty on the part of the carrier, but is subject to reasonable limitations and conditions. A carrier is not a common carrier as to every character of goods, but only as to such as he professes to carry; he may, therefore, refuse to accept for transportation goods of a character which it is not his business or custom to carry, and which he does not hold himself out as willing or undertaking to carry."

And so on throughout all of the authorities cited on this point. It is impossible to read any of them without perceiving at a glance that they do not sustain the fourth proposition relied on by appellant.

Copious quotations are made from authorities dealing entirely with other and different cases. For instance, beginning on page 35 of the brief, is an extract of about one page from the opinion of Judge Rogers in the case of *Harp v. Choctaw etc. R. Co.*, 118 Fed. Rep. 169.

An examination of this case will at once show that it is not at all to the point. The railroad company in that case for a short time after its road was opened permitted the plaintiff Harp, who was operating a coal mine on or near one of its switches, to have cars on this switch and load the same out of wagons. The switch belonged to the railroad company and was one used for its beneral business at the point where located. The business of the road, and especially the shipments of coal, soon developed to such an extent that it declined to permit the plaintiff to continue to load coalin this way. There were other coal mines in the vicinity, but they had private switches constructed at the expense partly of the railroad company and partly of the mine owner. The evidence showed that at the time the company notified the plaintiff that he could no longer load cars by wagon, he and one of his witnesses were the only persons who were so doing along the line of the road. The action was brought by the plaintiff to recover damages sustained by him by reason of the refusal of the road to permit him to continue loading by wagon as he had been doing. To show the exact questions decided, we quote from the language of the court, at page 172:

"On this state of facts, two questions arise: First: Was the refusal of the railroad to furnish

cars to plaintiff on its commercial tracks in its yards at Hartford, to be loaded by wagons, while at the same time it furnished cars to other mine owners on their private tracks, to be loaded by tipple, such a discrimination against plaintiff as the law condemns? Second: If not, was the railroad company, under the facts stated, compelled by law to put in a switch for plaintiff's convenience at such place as he required, or at any other place?"

After reviewing a number of authorities as to the duties of railroad companies the court answers both these questions in the negative and in so doing uses the language quoted in appellant's brief.

> "Of course," say counsel for appellant in their brief, page 38, "the courts would never permit the carrier to hide behind a void statute by making the existence of such statute a mere excuse for discriminating against a particular commodity, individual or community, but where the carrier is seeking in perfect good faith to obey the mandate of the legislature, even though it has exceeded its power in attempting to regulate Interstate Commerce, the courts will be slow to say that the carrier has no right so to do."

We are tempted to remark, that while the courts might be slow they would be none the less sure to place upon such conduct the condemnation that it merits.

A considerable part of the brief for the appellant is devoted to a discussion of the evils wrought by intoxicating liquors, and a vivid picture is drawn of the Kentucky mountaineer filling himself with liquor and "shooting up the town." Quotations are made from the decisions of courts describing these evils, especially in certain localities that seem to be particularly subject thereto. These arguments would be perfectly proper if addressed to some authority competent to legislate

upon the subject. It is a matter of common knowledge that efforts have been made from time to time to induce congress to legislate on the subject, and we think perhaps a bill is now pending to prohibit the shipping of liquor from one state into local option districts of another. None of these things, however, can justify the court in saying that that is law which is not law. This court must deal with the law as it exists and as declared by the Supreme Court of the United States and the various Federal Courts that have spoken on the subject. We think we are justified in saying that the entire trend of appellant's argument is, that notwithstanding the law is against it, yet for some reason outside of it and, as appellant conceives, higher than the law, the court should refuse to enforce it. Even the question of local option and prohibition has two sides, else the people of this country would not, since the government was formed, have tolerated the use and sale of intoxicating liquors. To at least a part of appellant's argument the appellee might well retort, that if the man who fills himself with liquor and then "shoots up" the town would use more malt and less moonshine, the results would be far better not only for himself, but for the community. The truth of the matter is, that restrictive legislation of the kind attempted by the legislature of Kentucky usually has the effect of permitting to go unobserved the stronger drink, while excluding the more bulky and less harmful. To be sure, these are not questions pertinent to the issue before the court. In view, however, of the fact that several pages of appellant's brief are devoted to discussion of the evils of intoxicating liquors, we feel justified in saying that the appellee and those engaged in its line of business are not the ones who furnish the dynamite with which to "shoot up the town." The "bootleggers" and the "blind tigers" are not the customers of the breweries.

We are somewhat surprised at this language used by appellants in their brief at page 73:

> "The sale of liquor is primarily unlawful and it is only legalized by the possession of a state as well as a government license to sell." And further on,
>
> "The sale of liquor is not a constitutional right of the citizen, but it is a privilege for which a specific authority must be granted."

While it makes but very little difference so far as the questions involved in this case are concerned, nothing can be more misleading than these statements. In the absence of legislation we submit the citizen has exactly the same right to manufacture and sell wine and beer, or whiskey for that matter, that he has to raise and sell grapes, barley or corn. The restriction placed upon the manufacture and sale of intoxicating liquors are placed there by the legislature or other law-making power, not only of this, but in every country where such restrictions exist, so far as we are aware.

That the L. & N. for some reasons, into which we need not inquire, is trying to hide behind a void Act of the legislature of Kentucky, is too plain to require statement. This road runs through the counties of Henderson, Webster, Hopkins and Christian, in the State of Kentucky, the last named being along the Tennessee border. It asks the court to say that in the reasonable exercise of its powers as a common carrier it has the right to refuse all shipments of intoxicating liquors to the County of Henderson, but to receive those assigned to the County of Webster; that it may refuse all shipments consigned to points in Hopkins, and accept all consigned to points in Christian County, and so on through the entire state where its road runs, making an arbitrary selection of such counties as it will ship to and of such as it will refuse shipments to, based

solely on an Act of the legislature of the State of Kentucky, which it admits is void and of no effect.

But is it necessary to discuss these questions further? Practically every question raised by the appellant is settled in the cases of *Crescent Liquor Co. v. Platt*, 148 Fed. Rep. 894, and *Danciger, et al v. Wells-Fargo & Co.*, 154 Fed. Rep. 397, both of which have been noted briefly before. They are both cases in which the shipper had brought suit to enjoin the carriers from refusing to receive their goods on substantially the same grounds that are made the grounds of this suit.

It is true that in the Danciger case the court dissolved the temporary restraining order. This was upon the ground, however, that the complainants had no right to require the carrier not only to carry the goods, but to collect the price thereof. In other words, it held that the carrier was not obliged to accept C. O. D. shipments, a question upon which it is easy to see there is room, at least, for serious doubt. In both of these cases the right of the shipper to a mandatory injunction where the carrier refused to accept his goods is recognized to the fullest extent. In fact, this does not seem to have been seriously questioned. In these and other cases the refusal of the carrier was based upon some especial reason which it was claimed excused the carrier from the performance of its duty.

It should further be borne in mind, that the appellant admits in effect that it accepts and delivers beer to all places along its line other than local option districts. It cannot claim the virtue, therefore, of having adopted a rule that it will not carry intoxicating liquors at all and therefore does not bring itself within the reasoning of those decisions that concede to the carrier the right to determine within reasonable limitations what class of merchandise it will carry. Should the appellant adopt a general rule, that hereafter it will not carry intoxicat-

ing liquors at all, a somewhat different question will be presented. We venture the opinion, however, that even in a case of this kind the courts would say that the rule was unreasonable. A rule of this kind must be based upon some reasonable ground. Until a carrier could show why it should be permitted to refuse a case of bottles filled with beer, and at the same time accept one filled with mineral water or other liquid in exactly the same shape and form, it is submitted that the courts would not for a moment permit it to make any such arbitrary and unreasonable rule. However, this, like many of the questions argued by counsel for appellant in their brief, is not before the court.

The Court of Appeals of the State of Kentucky has, since this litigation was instituted, decided the main question involved adversely to the appellant, namely: that shipments of the kind involved in this suit constitute Interstate Commerce and are entirely beyond the control of the state. The case of *Commonwealth v. McKinney*, decided November 17, 1910, 131 S. W., 497, involved the delivery in the State of Kentucky of intoxicating liquor to a minor who had ordered the same from the dealer in the State of Indiana. The delivery to the minor was in direct contravention of the terms of the statute. The court, however, following the decision of this court in *Adams Express Co. v. Commonwealth of Kentucky*, 214 U. S. 218, 53 L. Ed., 972, held its own statute absolutely void as applied to the shipment in question.

The same result was reached by the same court in a later case decided January 24, 1911, *Commonwealth of Kentucky v. Scott*, 133 S. W. 766.

Not only is the control of all interstate shipments vested in Congress, but no state may make any law limiting the right of a citizen of one state to purchase any article of commerce in any other state and to have

the same shipped to him wherever he may be without regard to the laws of any state.

*State v. Wignall*, 128 N. W. 935.

Notwithstanding all that counsel say as to the evil effects of intoxicating liquors, it seems unnecessary to cite further authorities or to adduce further argument in support of the proposition that beer is recognized as an article of Interstate Commerce and is entitled to the protection of the law to the same extent and under the same conditions as other commodities.

There has been no modification of the rule on this subject announced in the cases above referred to and the decisions of the Federal Courts, wherever the subject has come before them, reiterate the same.

*Danciger et al v. Stone*, 188 Fed. Rep. 510.
*Danciger et al v. Stone*, 187 Fed. Rep. 823.
*Barrett v. City of New York*, 183 Fed. Rep. 793.

Counsel for appellant have cited numerous authorities, a very considerable number of which we have not felt it necessary to notice for the reason that they decide questions that are not involved in this appeal. The most casual reference to these authorities will, we think, make this apparent, and we do not feel disposed, therefore, to lengthen our brief by analyzing each in detail. Upon the question as to whether or not the Vanderburgh Circuit Court had jurisdiction of the subject matter of the action, we beg to suggest that the authorities cited by counsel for appellant decide the exact question against their contention. Not a single authority is cited in support of the proposition that the statute of the State of Kentucky which really forms the basis of the defendant's case possesses any force or validity as applied to Interstate Commerce. It is not denied, in fact it is insisted by appellant in arguing the question of jurisdiction, that the shipments of beer in-

volved in this controversy constitute interstate commerce. Not only this court, but the Court of Appeals of the State of Kentucky have expressly held, that as applied to interstate commerce, the statute relied on is absolutely void. The attempt of the appellant to infuse life into this statute by the adoption of any rule or regulation of its own is so manifestly futile that it falls of its own weight. Against this array of authorities counsel for appellant address a most able argument upon the subject of the evil effects of strong drink, which as we have above observed would be entirely appropriate if addressed to the legislative power of the government or to the voters of a community on the subject of local option. To ask this court, however, to overrule its previous numerous decisions on this subject for the reasons urged is to ask the court to give effect to the opinion of counsel as to what the law ought to be rather than to declare what it is.

In closing, we quote the following language of the court in the case of *Crescent Liquor Co. v. Platt, supra:*

> "With the business carried on by complainants, it is not the duty of this court to inquire, other than to determine that it is lawfully conducted, and such I find it to be. It is an avocation provided for and protected by law, one recognized by the statutes of the State of West Virginia, as well as by the laws of the United States. It is not the duty of the judiciary to philosophize concerning the moral questions involved in this business, for that under our system of laws devolves upon another branch of our government."

The appellee submits, therefore, first, that an appeal does not lie in this case; and second, that the judgment of the court below was correct and should be affirmed.

GEORGE A. CUNNINGHAM,
*Attorney for Appellee.*

# LOUISVILLE & NASHVILLE RAILROAD CO. *v.* F. W. COOK BREWING CO.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 64. Submitted November 13, 1911.—Decided January 22, 1912.

This court has jurisdiction of an appeal from the Circuit Court of Appeals in this case, as the jurisdiction of the Circuit Court did not depend only on diversity of citizenship, but the constitutionality of a state law and the construction of a Federal statute were also involved.

Where relief in equity may be admissible under any circumstances at all, the objection of adequate remedy at law comes too late when made for the first time in this court.

Where a common carrier threatens to abjure its functions and duties as such in regard to a commodity, equity can grant relief to a dealer in such commodity whose business would be ruined by such continual action by the common carrier.

Beer and other intoxicating liquors are a recognized and legitimate subject of interstate commerce.

A State cannot forbid a common carrier to transport intoxicating liquors from a consignor in one State to a consignee in another State.

Until transportation of intoxicating liquor from one State to another is concluded by delivery to the consignee, the article transported does not become subject to state regulation.

The Wilson Act of August 8, 1890, c. 728, 26 Stat. 313, does not apply to interstate shipments of liquor until delivery to the consignee.

The Kentucky statute of 1906, prohibiting common carriers from transporting intoxicating liquors to "dry" points in Kentucky, while a valid enactment as to intrastate shipments, was not effective as to interstate shipments; in that respect it was an unconstitutional interference with interstate commerce.

A state statute regulating shipments of common carriers, although legal as to intrastate shipments, if illegal as to interstate shipments imposes no obligation upon the carrier in regard thereto, nor affords any excuse for refusal to perform its duties as a carrier.

Where the action of the common carrier is not discriminatory and the question is not an administrative one within the scope of the Interstate Commerce Commission, a question of general law as to the duties of the carrier arises which is one for a judicial tribunal, and not competent for the Commission; and the fact that the carrier may have filed notice with the Commission does not give it jurisdiction of the subject.

Where reasonableness of, or discrimination in, rates, is not an element, but the common carrier bases a refusal to perform its duty as such on legislative enactments, a shipper can resort to the courts to compel him to do so without first obtaining a finding from the Interstate Commerce Commission. *Texas & Pacific Railway* v. *Abilene Cotton Oil Co.*, 204 U. S. 246, distinguished.

172 Fed. Rep. 117, affirmed.

THIS suit started in a court of the State of Indiana and was removed by the defendant, now the appellant, to the Circuit Court of the United States.

The Brewing Company is an Indiana corporation, engaged in brewing beer at Evansville, Indiana, and sells its product in state and interstate trade. The Railroad Company is a Kentucky corporation, owning and operating a line of railway extending into many States, including Indiana and Kentucky.

The complaint averred, that although prepayment of freight had been tendered and every shipping regulation complied with, the railroad company had refused to accept for carriage from Evansville, Indiana, to stations on the line of its railway in the State of Kentucky, beer in kegs and cases, consigned to points which were "local option" or "dry" localities under the law of Kentucky, and had notified complainant and the public that it would discontinue receiving consignments of beer or other liquors for points in the State of Kentucky where the local option law of that State was in operation. The prayer of the bill was that the railroad company be enjoined from so refusing to accept the product of the brewing company for transportation from Evansville to such local option points in Kentucky.

A preliminary injunction was issued as prayed. Thereupon the defendant removed the case to the Circuit Court of the United States, upon the ground that there was diversity of citizenship, and also because the case involved questions arising under the Constitution and laws of the United States, namely, the validity of the law of Kentucky prohibiting the transportation and delivery of liquors to points in that State where the sale was prohibited, and also as a case arising under the act of Congress regulating interstate commerce of February 4, 1887, 24 Stat. 379, c. 104, as amended June 29, 1906, 34 Stat. 584, c. 3591. An answer was then filed and the cause heard upon bill and answer, with the result that the preliminary injunction allowed by the state court was made permanent and the railroad company enjoined from refusing to receive and carry beer from Evansville to any point upon its line of road in the State of Kentucky, wet or dry. An appeal by the railroad company to the Circuit Court of Appeals resulted in an affirmance of the order of the Circuit Court. For the opinion, see 172 Fed. Rep. 117.

*Mr. Henry L. Stone* and *Mr. Philip W. Frey*, with whom *Mr. George R. DeBruler* was on the brief, for appellant:

Shipments of beer or intoxicating liquor are interstate shipments, and as such constitute interstate commerce, and are regulated and to be governed by the provisions of the Act to Regulate Commerce and the amendments thereto. See § 1, as amended June 29, 1906; § 3, commonly known as the discrimination section, and §§ 13, 15 and 16, which prescribe the methods of civil procedure for the enforcement of the orders of the Commission where the carrier fails or neglects to obey the same.

This machinery was provided by Congress for the regulation of interstate commerce and the redress of all grievances and was intended to be exclusive of all other remedies for all unlawful acts of the carriers. *Central Stock Yards* v. *L. & N. R. R. Co.*, 112 Fed. Rep. 823; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Howard Supply Co.* v. *Ches. & Ohio Ry. Co.*, 162 Fed. Rep. 188; *Balt. & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Danciger* v. *Wells, Fargo & Co.*, 154 Fed. Rep. 379.

The order granting the preliminary injunction is void, because the state court of Indiana in which the suit started thereby undertook to affect property and rights of the parties beyond its territorial jurisdiction, or that of the Circuit Court into which the case was removed. The state court had no power to grant a mandatory injunction requiring appellant to perform acts in Kentucky affecting property in that State. 11 Cyc. 684; *Western Union Teleg. Co.* v. *West. & Atl. R. R. Co.*, 8 Baxter (Tenn.), 54.

After removal, it was the duty of the court below to dissolve the temporary restraining order and dismiss the action. *Auracher* v. *Omaha & St. L. Ry. Co.*, 102 Fed. Rep. 1; *Swift* v. *Phila. & Reading R. R. Co.*, 58 Fed. Rep. 858; *Sheldon* v. *Wabash R. R. Co.*, 105 Fed. Rep. 785.

A party on whose petition a cause is removed into the

Federal court is estopped to deny the jurisdiction of such court to render judgment against him therein *unless* on the ground that the state court was without jurisdiction. *Cowley* v. *Northern Pac. Ry. Co.*, 159 U. S. 569; *Mastin* v. *Chicago, R. I. & P. Ry. Co.*, 123 Fed. Rep. 827.

Even if the state court had jurisdiction, there was no equity in the bill. It is not averred that appellee was without adequate remedy at law. In fact, appellee had a complete remedy at law for the recovery of the damages, if any, it had sustained by appellant's refusal to ship and deliver shipments of beer offered by it for shipment, consigned to persons at the local option points in Kentucky, whose licenses to sell intoxicating liquors had expired. It is not alleged by appellee that it had any other kind of customers in Kentucky besides those who were engaged in the sale of such liquors under licenses so to do.

The rule of the appellant not to accept, transport, or deliver intoxicating liquors consigned to points in Kentucky, where the sale of such liquor is prohibited by law, is reasonable and valid.

At common law a common carrier was not required to transport all commodities; he was only bound to carry the things which he was in the habit of carrying and which were within his profession as a common carrier. *Dickson* v. *Great Northern Ry. Co.*, 5 Eng. Ruling Cas. 358.

Assuming the Kentucky act of 1906, prohibiting the shipment of liquor into local option districts, to be invalid as to interstate shipments, a common carrier which has adopted a rule or regulation to conform to the law as written cannot be required by mandatory injunction to accept liquor offered for shipment from a point outside of Kentucky for local option points within that State. 5 A. & E. Ency. of Law, 2d ed., 162; 4 Elliott on Railroads, §§ 1465, 1466; Moore on Carriers, § 5, p. 98; Hutchinson on Carriers, §§ 144–147.

Where it treats all of a class alike, a railroad company

can make reasonable rules, and can refuse to accept goods for carriage; *Harp* v. *Choctaw &c. Ry. Co.*, 118 Fed. Rep. 169; *S. C.*, aff'd, 125 Fed. Rep. 445; *Int. Com. Comm.* v. *Cincinnati &c. Ry. Co.*, 167 U. S. 479; *Int. Com. Comm.* v. *Baltimore & Ohio Ry. Co.*, 43 Fed. Rep. 37; *S. C.*, aff'd, 145 U. S. 263; *Kansas Pacific R. R. Co.* v. *Nichols*, 9 Kansas, 243; *Johnson* v. *Midland Ry.*, 4 Exch. 367.

The question is whether the rule or regulation restricting the business is a reasonable one. The carrier cannot arbitrarily refuse to carry a certain kind of goods which it has every facility to carry, and the carriage of which will not endanger its property, or the lives, property, health or morals of others. It cannot be said that it is unreasonable for a carrier to adopt a rule that it will not ship liquor into districts in which the sale of liquor is prohibited by state law, and into which the legislature has declared that it shall be unlawful to ship liquor, although the statute prohibiting the shipment is invalid as to interstate shipments.

Carriers have some discretion, upon giving due notice, as to what they will carry, provided all persons are treated alike, without discrimination. The legislature cannot require the carrier to separate interstate passengers from intrastate passengers, but the carrier may make the separation if it elects to do so. *Hall* v. *DeCuir*, 95 U. S. 485. The carrier ought not to be required to take the risk of litigation and penalties. Under the statutes we are considering the carrier must, in order to be sure that it will escape the penalty, know that the goods have been ordered by some person in the State to which they are to be shipped, and if what purports to be an order is presented to the carrier, it takes some risk, unless it knows that the order is genuine. *American Express Co.* v. *Commonwealth*, 30 Ky. Law Rep. 207; *Crigler &c.* v. *Commonwealth*, 27 Ky. Law Rep. 921.

The risks are so great as to justify the carrier in making

a regulation, upon due notice, that it will not carry intoxicating liquors at all into any local option district, and that it will treat all shippers, both resident and nonresident, alike.

The legislature of Kentucky has legally determined, while dealing with a matter within its jurisdiction, that the shipment of liquor into the local option districts from any point is dangerous to the health, safety and good morals of the people of that district, and the carrier has a right to aid the people in avoiding that danger. It may refuse to carry high explosives because of the danger to life and property, although such explosives are essential to the conduct of useful business enterprises, but the theory upon which the statute in this case is based is that liquor is not only dangerous to life and property, but to the health and good morals of the people. See *Adams Express Co.* v. *Commonwealth*, 5 L. R. A. (N. S.) 630; *S. C.*, 92 S. W. Rep. 932, where the court said that an express company could not legitimately thrust the shadow of its greed between the people and their uplift.

See *Champion* v. *Ames*, 188 U. S. 321, upholding an act of Congress prohibiting the carriage of lottery tickets by express companies engaged in interstate commerce. See also *Austin* v. *Tennessee*, 179 U. S. 343.

One who sells goods to be delivered in another State may have the constitutional right to deliver them, but he has no constitutional right to have them delivered by a carrier who does not profess to carry that class of goods, but refuses to do so for anyone, after giving due notice to all. *Cook* v. *Marshall County*, 196 U. S. 261; *Mugler* v. *Kansas*, 123 U. S. 662; *State* v. *Goss*, 59 Vermont, 266.

A carrier may lawfully refuse to carry goods where such service will be exposed to peculiar and unusual danger, for instance, to the fury of a mob. *Pearson* v. *Duane*, 4 Wall. 605, 615.

Already Congress had made considerable progress in

providing restrictions upon the interstate transportation of intoxicating liquors by common carriers. See act of March 4, 1909, §§ 238–240; U. S. Comp. Stat., Supp. 1909.

The people of prohibition States and of localities in other States who have voted out or prohibited the sale of intoxicating liquors have long waited for an act of Congress positively prohibiting the transportation of such liquors from points without to points within such States and localities; and, in the absence of Federal legislation to that end, it is within the lawful powers of interstate carriers to establish reasonable regulations, such as this record shows appellant unselfishly adopted, foregoing the revenue to be derived from such traffic, after due notice to the public, whereby they will not transport or deliver such liquors to points in prohibition territory, no matter whether the same be interstate or intrastate traffic.

In Kentucky to-day there are ninety-six "dry" counties, and only twenty-three "wet" counties. See *Adams Express Co.* v. *Kentucky*, 206 U. S. 129; *Milwaukee Malt Extract Co.* v. *Chicago &c. Ry. Co.*, 73 Iowa, 98.

There is manifest and well-recognized difference between intoxicating liquors and all other kinds of merchandise. By the common consent of mankind the trade in intoxicants is regarded as dangerous and a menace to the public. Such liquor is an article which is in a class by itself, and it is made by the Wilson Act of 1890 subject to the will of the State, and so it is competent for the legislature to prohibit the sale of liquor in original packages by the consignee within the limits of the State, although it may have been shipped from a point without the State and thus have been the subject of interstate commerce. *Platt* v. *LeCocq*, 158 Fed. Rep. 723.

*Mr. George A. Cunningham* for appellee:

This suit does not arise under the Interstate Commerce

Act, nor does it arise under the Constitution and laws of the United States, and the appeal should be dismissed. *Empire State-Idaho M. & D. Co.* v. *Hanley*, 198 U. S. 292; *Arbuckle* v. *Blackburn*, 191 U. S. 405; *Spencer* v. *Duplan Silk Co.*, 191 U. S. 526; *Bonin* v. *Gulf Co.*, 198 U. S. 115; *Bankers' Mutual Casualty Co.* v. *Railway Co.*, 192 U. S. 371; *Cochran* v. *Montgomery County*, 199 U. S. 182, 260; *Chapman* v. *Brown*, 207 U. S. 88, 116; *Empire State-Idaho M. & D. Co.* v. *Hanley*, 205 U. S. 225; *Weir* v. *Rountree*, 216 U. S. 603; *St. L., K. C. & C. R. Co.* v. *Wabash Co.*, 217 U. S. 247; *Bagley* v. *General Fire Ex. Co.*, 212 U. S. 477.

This is not a case in which the remedies provided by the Interstate Commerce Act are exclusive. Those remedies are exclusive only when it is sought to enforce some provision of the act itself, and not when it is sought to enforce a right theretofore existing either at common law or by statute, unless the enforcement of such right is by the act committed to some other tribunal. *Central Stock Yards Co.* v. *L. & N. R. R. Co.*, 112 Fed. Rep. 823, and *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, do not apply, and see *Danciger* v. *Wells-Fargo & Co.*, 154 Fed. Rep. 379.

The state court had jurisdiction of the subject-matter and of the parties, so that it was authorized to issue a temporary restraining order.

Where a court has jurisdiction of the parties, especially in cases of injunction and specific performance, it will grant relief, even though the property to be affected is in another State. Even proceedings in the courts of one State may be enjoined by courts of another State where the latter have jurisdiction of the parties. 1 High on Injunctions, 4th ed., § 103; 6 Pomeroy's Eq. Jur., § 670; *Eingarter* v. *Illinois Steel Co.*, 59 Am. St. Rep. 859, note; *Hawkins* v. *Ireland*, 58 Am. St. Rep. 534, note; *Hayden* v. *Yale*, 40 Am. St. Rep. 232; and see *C., B. & Q. Ry. Co.*

v. *B. C. R. & N. Ry. Co. et al.*, 34 Fed. Rep. 481; Hutchinson on Carriers, 3d ed., § 149; *Bluthenthal* v. *Southern Ry. Co.*, 84 Fed. Rep. 920.

As to the right to mandatory injunction in cases of this kind, see Elliott on Railroads, 2d ed., § 1564, and authorities there cited. Mandatory injunction is the proper remedy to compel a carrier to accept shipments of intoxicating liquors which it refuses because of void state legislation. *Danciger* v. *Wells-Fargo & Co., supra; Crescent Liquor Co.* v. *Platt*, 148 Fed. Rep. 897.

The appellant has the right to make any rule that it will not accept, transport, or deliver intoxicating liquors consigned to points in Kentucky where the sale of such liquor is prohibited by law.

As to the act of March 21, 1906, making it unlawful to bring or deliver any intoxicating liquor into any local option county or district of the State of Kentucky, and imposing penalties, the Court of Appeals of the State of Kentucky, in October, 1907, about six months after this answer was filed, held that act unconstitutional and void as to interstate shipments. *Cincinnati, N. O. & T. P. Ry. Co.* v. *Kentucky*, 104 S. W. Rep. 394; citing *Heyman* v. *Southern Ry. Co.*, 203 U. S. 270; *Rhodes* v. *Iowa*, 170 U. S. 412; *Lord* v. *Goodall*, 102 U. S. 541, holding that the transportation of intoxicating liquor from one State to another is interstate commerce and entirely beyond the control of the States.

Appellant admits in effect that it accepts and delivers beer to all places along its line other than local option districts. It is not the rule that it will not carry intoxicating liquors at all, and therefore does not bring itself within the reasoning of those decisions that concede to the carrier the right to determine within reasonable limitations what class of merchandise it will carry. Should the appellant adopt a general rule not to carry intoxicating liquors at all, a somewhat different question may be presented;

but even in such a case the courts would say that the rule was unreasonable.

The Court of Appeals of Kentucky has, since this litigation was instituted, decided the main question involved adversely to the appellant, holding that shipments of the kind involved in this suit constitute interstate commerce and are entirely beyond the control of the State. *Commonwealth* v. *McKinney*, 131 S. W. Rep. 497; *Adams Express Co.* v. *Kentucky*, 214 U. S. 218; *Kentucky* v. *Scott*, 133 S. W. Rep. 766.

The control of all interstate shipments is vested in Congress, and no State may make any law limiting the right of a citizen of one State to purchase any article of commerce in any other State and to have the same shipped to him wherever he may be without regard to the laws of any State. *State* v. *Wignall*, 128 N. W. Rep. 935.

Notwithstanding any effects of intoxicating liquors, beer is recognized as an article of interstate commerce and is entitled to the protection of the law to the same extent and under the same conditions as other commodities. *Danciger* v. *Stone*, 187 Fed. Rep. 823; *S. C.*, 188 Fed. Rep. 510; *Barrett* v. *City of New York*, 183 Fed. Rep. 793.

MR. JUSTICE LURTON, after making the above statement, delivered the opinion of the court.

1. The jurisdiction of this court to entertain an appeal in this case cannot be seriously controverted. The jurisdiction of the Circuit Court was not dependent alone upon diversity of citizenship. There was involved not only the validity of the law of Kentucky as a regulation of interstate commerce, but a question as to whether the sole remedy in any such case was not by an application to the Interstate Commerce Commission.

2. The objection that there was an adequate remedy at law, assuming that the subject is one for any tribunal other

than the Interstate Commerce Commission, comes too late, if ever available, the objection being now made for the first time, so far as is discoverable from the record. The announced purpose of the railroad company to abjure its function and duty as a common carrier in respect of interstate shipments of all intoxicating liquors to localities in the State of Kentucky, where the Kentucky local option prohibition laws prevailed, threatened the ruin of complainant's business, and relief by injunction against such a continued course of conduct was certainly one which in such circumstances might be granted. Where the case is one in which, under any circumstances, relief in equity may be admissible, it is too late to say that there was an adequate remedy at law only upon review proceedings. *Kilbourn* v. *Sunderland*, 130 U. S. 505.

3. The case was heard upon bill and answer. The defense is based solely upon the terms of the Kentucky act of March 21, 1906, now § 2569–a, Carroll's Kentucky Statutes of 1909, entitled an act "to regulate the carrying, moving, delivering, transferring or distribution of intoxicating liquors in local option districts." By that act it is made unlawful for any common carrier to transport beer or any intoxicating liquor to any consignee in any locality within the State where the sale of such liquors has been prohibited by vote of the people under the local option law of the State. A violation of the law subjects the offender to a fine of not less than fifty nor more than one hundred dollars for each offense.

Upon the assumption that this legislation effectively prohibited both state and interstate transportation of such commodities within the State, the railroad company notified all of its agents, in and out of the State, to refuse to receive such liquors when consigned to any local option point. This notification was by a printed circular letter, which set out the full text of the act, and gave a full list of all such local option points. In express terms this

notification applied to both inter- and intrastate shipments; and, it is averred, this circular was filed with the Interstate Commerce Commission. It is not, however, averred that the Commission either took any action thereon, or that it was asked to take any action.

The legality of the attitude of the railroad company toward interstate shipments of intoxicating liquors to local option points in Kentucky must turn upon the validity of that legislation as applied to interstate shipments.

By a long line of decisions, beginning even prior to *Leisy* v. *Hardin*, 135 U. S. 100, it has been indisputably determined:

a. That beer and other intoxicating liquors are a recognized and legitimate subject of interstate commerce;

b. That it is not competent for any State to forbid any common carrier to transport such articles from a consignor in one State to a consignee in another;

c. That until such transportation is concluded by delivery to the consignee, such commodities do not become subject to state regulation, restraining their sale or disposition.

The Wilson act, which subjects such liquors to state regulation, although still in the original packages, does not apply before actual delivery to such consignee where the shipment is interstate. Some of the many later cases in which these matters have been so determined and the Wilson act construed are: *Rhodes* v. *Iowa*, 170 U. S. 412; *Vance* v. *Vandercook Co.*, 170 U. S. 438; *Heyman* v. *Southern Railway*, 203 U. S. 270; *Adams Express Co.* v. *Kentucky*, 214 U. S. 218.

Valid as the Kentucky legislation undoubtedly was as a regulation in respect to intrastate shipments of such articles, it was most obviously never an effective enactment in so far as it undertook to regulate interstate shipments to dry points. Pending this very litigation, the Kentucky Court of Appeals, upon the authority of the line of cases

above cited, reached the same conclusion. *Cincinnati, N. O. & T. P. R. Co.* v. *Commonwealth*, 126 Kentucky, 563.

The obligation of the railroad company to conform to the requirements of the Kentucky law, so far as that law prohibited intrastate shipments, is clear, and to this extent its circular notification was commendable. But the duty of this company, as an interstate common carrier for hire, to receive for transportation to consignees upon its line in Kentucky from consignors in other States any commodity which is an ordinary subject of interstate commerce, and such transportation, could not be prohibited by any law of the State of such consignee, inasmuch as any such law would be an unlawful regulation of interstate commerce not authorized by the police power of the State. It is obvious, therefore, that in so far as the Kentucky statute was an illegal regulation of interstate commerce, it neither imposed an obligation to obey, nor affords an excuse for refusal to perform the general duty of the railroad company as a common carrier of freight.

The fact that the circular notice of the company referred to was filed with the Interstate Commerce Commission is incidentally stated in the answer of the company, and this fact is now made the basis for an argument that neither the state court nor the Circuit Court had any jurisdiction, and that an application should have been made to the Interstate Commerce Commission for an order requiring the railroad company to desist from refusing to transport such articles in interstate commerce.

Why should the brewing company have made complaint to the Commission. What relief could it afford? There was no tariff question. There was no discrimination against shipments tendered by complainant and like shipments tendered by other brewers to the same points. There was no claim that the commodities tendered were inherently dangerous to transport, or that the railroad company did not have transportation facilities. Evans-

ville was not discriminated against in favor of like shipments to the same points. To say that there was a discrimination between shipments of intoxicants and other commodities does not make a case of discrimination or preference where the denial of such shipments is based, as is the case here, wholly and solely upon an illegal restraint upon that kind of interstate commerce, is to reason in a circle, for the question comes back at last to the validity of the law forbidding such shipments. There was no discrimination if the law was valid, and the result must turn, not upon any administrative question or questions of fact within the scope of the power of the Commission, but upon the validity of the legislation which controlled the action of the carrier. That is a question of general law for a judicial tribunal, and one not competent for the Commission as a purely administrative body.

The decision in the case of *Texas & Pacific Railway* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, is not applicable here. The question there was one of the reasonableness of a rate. Such a question is primarily one of administrative character, and the propriety of a prior resort to the Commission to obtain a ruling upon the question of reasonableness involved the very heart of the whole statute. That there might be uniformity in rate-making necessarily required a resort to that body as a basis for a common law recovery of an excessive charge.

The result is that the decree of the court below must be

*Affirmed.*